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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Laurel Beeler, Magistrate Judge

GROUSE RIVER OUTFITTERS, LTD.,)

Plaintiff,)

VS.)

ORACLE CORPORATION,)

Defendant.)

NO. C 16-02954 LB

San Francisco, California

Monday, July 8, 2019

TRANSCRIPT OF PROCEEDINGS

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Monday - July 8, 2019

1:32 p.m.

P R O C E E D I N G S

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THE COURT: Thank you for standing. I am a remain-seated courtroom, although we can get up for the jury. We will get up for the jury.

MR. KIEVE: It's traditional training, Your Honor.

THE COURT: I know. I know. You know, Judge Legge was always a remain seated, and I think Judge Henderson was a remain seated.

And so I, having spent my whole practice in the Federal Building, thought it would be enormously impolite to ask my colleagues to stand for me. It's just a little silly. But I do think it's appropriate for the jury. So, thank you.

All right. So Elaine will call the case.

THE CLERK: Calling Civil Action 16-2954, Grouse River Outfitters Limited versus Oracle Corporation.

Counsel, if you could please state your appearances for the record.

MR. KIEVE: Yes. First of all, for Mr. -- excuse me -- for Grouse River Outfitters Limited, my name is Loren Kieve. Good afternoon, Your Honor.

THE COURT: Good afternoon.

Mr. Susman?

MR. SUSMAN: Stephen Susman for Grouse River,

1 Your Honor.

2 **MR. FALLIS:** Glenn Fallis for Grouse River.

3 **THE COURT:** Nice to meet you.

4 **MR. KIEVE:** Actually, he's not for Grouse River. He
5 is Grouse River.

6 **THE COURT:** I appreciate that.

7 Nice to meet you. Thanks for coming.

8 **MS. XI:** And Meng Xi. Good afternoon, Your Honor.

9 **THE COURT:** Good afternoon.

10 Ms. Ray?

11 **MS. RAY:** Good afternoon, Your Honor. Sarah Ray with
12 Latham & Watkins for Oracle and NetSuite.

13 **MS. GREENWALD:** Elyse Greenwald from Latham for
14 Oracle.

15 **MS. JOVAIS:** Alicia Jovais from Latham for Oracle.

16 **MS. AGUILAR:** Diana Aguilar for Latham -- from Latham
17 for Oracle.

18 **THE COURT:** Exactly.

19 **MR. GATTEY:** Hi. I'm Scott Gattey.

20 **THE COURT:** Nice to see you all.

21 Okay. So maybe it's easiest for me to begin by -- just to
22 begin with the latest in limine, to tell you what I think is in
23 and out from a Rule 26 perspective, and then we can talk about
24 it.

25 I meant to call up my spreadsheet here, which was helpful.

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1 Thank you for filing it in native format. That was good.

2 The issue is just -- and I have my other -- remind me. I
3 do have another, sort of, whole to-do list. So we should just
4 make sure we cover everything we need to cover today.

5 Okay. From a what's-in-and-what's-out perspective, from
6 the adequacies of disclosures, I went through your papers. I
7 looked at the spreadsheet. I looked at what you said about
8 different things. I came up with a chart. You know I like my
9 charts. And I just tried to look at what worked from a -- and
10 I'll tell you what I think did work from a Rule 26 perspective,
11 and then all the other things don't work.

12 And so what I think did work from a Rule 26 is from an
13 adequacy of disclosure. And I guess the bottom line, I didn't
14 do the math, but it comes out to less than a million dollars --
15 right? -- because of the profits issues. So --

16 **MR. KIEVE:** Your Honor, at some point we'd like to
17 make a proffer on that.

18 **THE COURT:** We can talk about it. I just thought I
19 would tell you what I thought, and then we can -- that way, you
20 can decide how best to focus your efforts. I didn't mean to
21 foreclose argument. I just meant to give a roadmap to what I
22 was thinking to make it easier for you to decide what you
23 wanted to talk about.

24 So I thought from adequacy of disclosure, what was paid to
25 NetSuite, which is on the latest spreadsheet, is about

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1 \$405,000; paid to partners, consultants, systems and support
2 related to NetSuite, which is now around 158 and change; lease
3 expenses, which is roughly \$200,000. And that was it. There
4 were some categories that were withdrawn, and then the other
5 things I just thought weren't adequately disclosed.

6 So that's where I think -- that's where I was after going
7 through things, and then we can talk about whatever you would
8 like to talk about by category.

9 And I assume, since these -- I will just say to Oracle, I
10 assume -- I mean, these issues, just to kind of define the
11 issues, that there was an adequate disclosure for Rule 26
12 purposes does not mean necessarily that there's admissible
13 evidence or a foundation for putting in that evidence.

14 That said, I've got to think, in those remaining
15 categories, it's weight, not admissibility, because there's a
16 fair amount of cross-examination you could do. I mean,
17 maybe -- you have to lay foundation. So that's Point 1.

18 Point 2 -- and I didn't want to lose this thought -- which
19 is this -- and this is a reaction -- this overall arc of
20 deviating from the landscape of what the expert relied on is
21 not okay, not only from a disclosure basis, but also it's fair
22 cross-examination. I will just sort of say that, because the
23 expert built his conclusions on projections that are your bases
24 for calculating lost profits, I mean, anything that deviates
25 from that is just problematic, not just from a fair notice

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1 perspective, but because it just opens you up for
2 cross-examination.

3 That said, as I said, a lot of the categories, assuming
4 foundation, seems -- foundation can be so easy for categories
5 of expenses. And it seems that challenges to that might be
6 more weight, not admissibility.

7 But, so let's talk about the Rule 26 issues. Okay.

8 **MR. KIEVE:** All right. As I see it, you're prepared
9 to say that any amounts that were paid to NetSuite directly are
10 in. Stop me if I'm wrong.

11 **THE COURT:** That \$405,000 that's disclosed on the
12 "Project Cost by Vendor" on the NetSuite tabs, yes.

13 **MR. KIEVE:** And then paid to partners, consultants,
14 systems and support.

15 **THE COURT:** Yes, which is now -- it was 200 initially.
16 It's down to 158 and change.

17 **MR. KIEVE:** Correct. And just to remind Your Honor,
18 these were all numbers that were supplied by two of NetSuite's
19 counsel on December 28th, 2017. They've had all of this
20 information since then.

21 **THE COURT:** No, I appreciate that, although one of the
22 things that I wanted to say is that it's not enough just to
23 give the numbers. You've got to essentially give more than
24 that. So, for example --

25 **MR. KIEVE:** And so may I respond to that, Your Honor?

1 **THE COURT:** Yes.

2 So *Bennion*, for example, and you have to require your
3 computation, and the mere possession of raw financial data is
4 not enough.

5 And they're not required to compute damages. You're
6 required to do so.

7 So those are some of the -- it's not just about listing
8 stuff.

9 **MR. KIEVE:** Okay.

10 **THE COURT:** It's about the basis for the conclusion.

11 **MR. KIEVE:** Okay. The project-related damages --

12 **THE COURT:** Yes.

13 **MR. KIEVE:** -- are, in fact, specifically called out,
14 done through actual calculations based upon the books and
15 records of this company.

16 These are not numbers that were just pulled out of the
17 air. The spreadsheet has specific references to the QuickBooks
18 files that were there.

19 **THE COURT:** Let me pull up the spreadsheet so we can
20 look at it in context.

21 **MR. KIEVE:** What I would like to have, Your Honor, is
22 Mr. Fallis take you through, if you'd like, because he's much
23 more tuned into this than I am at this point.

24 **THE COURT:** Okay. That's fine.

25 **MS. RAY:** So, Your Honor, with regard to -- I believe

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1 what Mr. Kieve is talking about is a different category that
2 you have just held is not an admissible category. I want to
3 make sure that we're clear that that's what we're -- we're now
4 talking about a new category that he's trying to argue
5 should be --

6 **THE COURT:** Well, so I thought we were talking about
7 project-related wages that are --

8 **MR. KIEVE:** Exactly.

9 **THE COURT:** -- disclosed on the spreadsheets as about
10 \$1.3 million.

11 I'll just tell you what my issue was so you can think
12 about it.

13 **MR. KIEVE:** Okay.

14 **THE COURT:** It appears -- so I was going to -- of
15 course, I do not appear to have access to the network on this
16 computer. So --

17 **MR. KIEVE:** I can give you a hard copy of this.

18 **THE COURT:** No, no. It's totally fine. That's fine
19 if you want to give me a tabbed hard copy.

20 This is the perils of --

21 **MR. KIEVE:** Would that be useful?

22 **THE COURT:** Sure. The native spreadsheet was great
23 because I could click from tab to tab, but if you have all the
24 tabs there...

25 So when I looked at it -- these are the notes I took from

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1 our review -- of course, it's not as easy to see the tabs here
2 as it is in the Excel spreadsheet -- the number appeared to be
3 derived from the wage impact tab of the spreadsheet,
4 multiplying total wages by a percent allocation to NetSuite --

5 **MR. KIEVE:** Correct.

6 **THE COURT:** -- and without any explanation about how
7 the percentages were calculated or what assumptions went into
8 the percentages.

9 And my concern was not that they're not listed on the
10 spreadsheet, but my concern was that, you know, for example,
11 disclosing lump sums for -- this is out of *Valley Surgical*
12 *Center* -- disclosing lump sums for each year of decline in a
13 business and a lump sum for lost business opportunities without
14 describing the assumptions or explaining how the calculations
15 are made isn't a sufficient Rule 26 disclosure.

16 So it's not just the numbers. It's the disclosure of the
17 bases of the assumptions that drive the final numbers that's of
18 concern, because you can't just list it on a spreadsheet. And
19 so that's the concern. And if it's not -- and so they don't
20 have to do your work for you. You have to do your work for
21 them.

22 And this has been the persistent issue with the lost
23 profit calculations too, is that the final numbers are grounded
24 in assumptions that are speculative or not apparent, and not
25 apparent, in this category, from a Rule 26 perspective.

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1 **MR. KIEVE:** From a Rule 26 perspective, the purpose of
2 Rule 26 is to provide the other party with sufficient notice of
3 what your damages are and how they're calculated.

4 Giving a party a spreadsheet that sets forth exactly what
5 the numbers are, that has the formula, that has all the
6 calculations is exactly what the rule is designed to do.

7 And then they can ask: Okay. Let's find out more about
8 this.

9 Because -- you take a look at the cases we cited. The
10 *Toyota Motor* case, on page 3 the court said (reading):

11 "Toyota disclosed the plan in its initial Rule 26
12 disclosure. The plan was also disclosed in interrogatory
13 responses. The plan was also referenced in May 22
14 correspondence. This is adequate compliance with Toyota's
15 disclosure obligations, and the lack of further detail is
16 harmless."

17 Quote (reading):

18 "The plaintiff cannot fault the defendant for the
19 fact that the defendant took no discovery about the
20 program."

21 We gave them this information. It was there.

22 Moreover, Your Honor, Mr. Perry, their own expert, had it.
23 He looked at it. It's included as one of the reference sources
24 that he looked at in his report. So not only did they look at
25 it, but Mr. Perry looked at it.

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1 And the notion that somehow we have to give them more
2 disclosure than a full-fledged Excel spreadsheet that sets out
3 chapter and verse, I think, is simply completely incompatible
4 with both the discovery rules as well as the concept of
5 Rule 26.

6 **THE COURT:** What's the -- I mean, how is the
7 allocation done to NetSuite? That's the part. It's not that
8 the -- I mean, look, I understand that whatever the wages paid
9 to employees is readily ascertainable from a company's
10 databases and viewable in an Excel platform. So that's not the
11 issue. The issue is the disclosure of this as damages
12 attributable -- caused by -- and that rests on assumptions that
13 I can't tell by looking at the spreadsheet. So that was my
14 concern.

15 **MS. RAY:** Can I respond?

16 **THE COURT:** Yes.

17 **MS. RAY:** There's a few other issues --

18 **THE COURT:** Yes.

19 **MS. RAY:** -- with this as well.

20 First of all is, there's no evidence in the record. There
21 is nothing on their exhibit list. They have not given us any
22 information to support any of these numbers. There's no
23 evidence on the exhibit list that could possibly support
24 this --

25 **THE COURT:** That's a -- so just let me touch on that,

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1 because that, of course, is an issue. It's not an issue that I
2 can really address based on the motions because -- I mean, I --
3 you know, all these exhibits. I take your word for it.

4 And the point is, what I meant to say to you, if I didn't
5 say it already at the beginning, the issues about adequacy of
6 Rule 26 -- I did say it at the beginning -- the adequacy of the
7 Rule 26 disclosures is a different issue than whether there's
8 evidence to prove it up.

9 If there's no evidence to prove it up, there's no
10 foundation for the testimony. If it's not on the evidence
11 list, then testimony doesn't come in.

12 **MS. RAY:** Right. And I --

13 **THE COURT:** So that's another issue. So that might be
14 correct, and I don't know.

15 **MS. RAY:** Right. Well, I think that that is the case.
16 But I also do think there is a little bit of overlap between
17 the Rule 26 adequacy notice and the fact that we are talking
18 about an out-of-pocket calculation that was the most
19 operative -- most recent operative out-of-pocket calculation,
20 and it was not one that we challenged.

21 And you know that in our papers --

22 **THE COURT:** So you did not challenge -- exactly.
23 Well, you said that you're not -- and I didn't have time this
24 morning to go back and look at the expert report about roughly
25 a million dollars out-of-pocket expenses --

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1 **MS. RAY:** Exactly.

2 **THE COURT:** -- that you called out in your papers.

3 Also, the heat in here is terrible. If we could tell GSA
4 it's not going to be good enough for trial. We're going to
5 roast in here with a jury.

6 So, true, I didn't go back and pair that up. And so
7 you're not challenging the roughly million dollars of
8 out-of-pocket expenses.

9 **MS. RAY:** No. We are, Your Honor. We absolutely --

10 **THE COURT:** You're challenging them foundationally by
11 way of admissible evidence to prove them, but not categorically
12 by way of Rule 26.

13 **MS. RAY:** So Rule 26 -- so I do not think that these
14 are adequate computations for the reasons that you have just
15 said. I don't think they're adequate computations just by
16 putting --

17 **THE COURT:** I couldn't tell.

18 **MS. RAY:** -- putting numbers --

19 **THE COURT:** So that's showing something about the
20 Rule 26. If there's no evidence to back it up, then --

21 **MS. RAY:** Right. And putting numbers on a spreadsheet
22 does not make a computation, and that's all that they have done
23 here.

24 And so the other problem with this is that when we were
25 preparing for trial based on Mr. McEwen's schedule, which sets

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1 out the out-of-pocket costs, we deposed him on May 24th. It
2 was six weeks before trial. And he wasn't saying, "I've done
3 these computations." He was saying, "Here's what Glenn Fallis
4 gave to me."

5 **THE COURT:** No, I appreciate that. That's why I
6 threw --

7 **MS. RAY:** "And here's what" --

8 **THE COURT:** -- out all the profits.

9 **MS. RAY:** -- "you're moving forward to trial with."

10 It's not -- you know, and we didn't challenge it. And
11 Mr. -- you know, the brief that was filed yesterday stated that
12 you excluded Mr. McEwen entirely. That's not correct.

13 **THE COURT:** Incorrect. I only excluded the
14 calculation of lost profits because the foundation, the
15 predicate for the conclusions were speculative.

16 **MS. RAY:** And, Your Honor, what is left in the case
17 was the one-point, you know, \$1 million in out-of-pocket
18 expenses for Mr. McEwen's report.

19 **THE COURT:** Correct.

20 **MS. RAY:** They have abandoned that. These are
21 different numbers. They are not supported in the record.
22 They're not supported in their trial exhibits. They have
23 abandoned Mr. McEwen, and they do not have evidence to put on a
24 damages case at trial. They just don't.

25 And Rule 37 is self-executing, and --

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1 **THE COURT:** I appreciate that. I appreciate that.
2 This is a problem if there's no evidence to back up the rule.

3 Looking at Rule 26, again, none of this is that hard.
4 What you paid to NetSuite, it's got to be that that's -- I
5 cannot believe that there are not some out-of-pocket expenses
6 that Grouse River incurred that aren't provable and
7 unproblematic, such as the monies it paid for a product that
8 didn't work. It's not like a hundred percent nothing there.

9 **MS. RAY:** There's nothing in the record, Your Honor.
10 There's nothing in the exhibit list that they could use to
11 prove that. And they did not -- the spreadsheet they were all
12 looking at, it's not on the exhibit list.

13 **THE COURT:** Well --

14 **MS. RAY:** It's not even something --

15 **THE COURT:** So --

16 **MS. RAY:** -- that they put --

17 **THE COURT:** So --

18 **MS. RAY:** -- into evidence.

19 **THE COURT:** -- I thought about that.

20 And tell me why this is wrong so I could a hundred percent
21 be wrong, because I have no problem with that.

22 I know what I pay in my out-of-pocket monthly expenses for
23 maintaining my house or something like that. Let's just call
24 it rent. And it seems to me that you could challenge weight.
25 You could say: Well, he testified about it, but there's no

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1 documents to back it up. What kind of a hack damages case is
2 this?

3 But it doesn't mean that he doesn't have the -- that
4 Mr. Fallis wouldn't have the -- he might or he might not -- but
5 that the foundation couldn't be laid for at least some
6 out-of-pocket expenses.

7 I find it difficult to believe, in a demonstrable business
8 relationship that the parties had, that there's not something
9 concrete, even if the actual invoices aren't on the evidence
10 list. I haven't looked at the evidence list in that much
11 detail, but it seems that that would be a weight issue, not
12 an --

13 **MS. RAY:** They are not --

14 **THE COURT:** -- admissibility issue.

15 **MS. RAY:** They are not on the exhibit list.

16 And I do think that there has to be a role for the Court
17 to say there is not sufficient evidence to send to a jury on
18 this damages case when they are literally just going to have a
19 fact witness say: I think that maybe I must have paid
20 something like.

21 I mean, that's just not enough to go -- to take
22 the Court's time, to take the jury's time. We're now talking
23 about less than a million dollars.

24 **THE COURT:** Correct.

25 **MS. RAY:** And this is -- what are we doing here?

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1 **THE COURT:** Well, I have wondered that from the
2 beginning on some level.

3 But I'm very interested in what you have to say,
4 Mr. Susman. But let me just finish this thought with Ms. Ray,
5 and then I'm interested to hear what you have to say.

6 At some point -- I can't really tell until I hear people
7 talk about what happened at trial. People get stuck on their
8 positions. They think that their recovery that they can get --
9 because I think a lost profit analysis is very difficult under
10 the best of circumstances. I wanted to reread my *Daubert* order
11 to sort of remind you about being a little careful to go too
12 far with your own expert testimony because we want to ground it
13 in facts that have to do with this business.

14 But it occurred to me, at the end of the day, which is
15 what Mr. Gattey was struggling for from the beginning, was
16 something along the lines of: Hey, this thing happened. I
17 incurred these hard expenses.

18 I have to think that there are hard expenses that were
19 incurred. And we're stuck with a contract with an attorney
20 fees provision that you guys agree -- I have the identical
21 case. Sadly, it's a bench trial. And so I have the identical
22 case in another online platform case. And, again, same issue.
23 You know, I have a fees provision. And in that case, I say
24 this as a matter of public record all the time, if it were a
25 jury trial, which, sadly, it's not, the jury might say: A pox

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1 on both of you.

2 And so this always -- this kind of -- and you, Mr. Gattey,
3 from the beginning, described the case as sophisticated people
4 negotiating a sales platform with eyes open and a contract that
5 they hewed to. And so -- and then people's expectations get
6 wound up, and then monies get spent, even if -- I have no idea
7 if you're on a contingency basis or not from a plaintiff's
8 perspective, but there is a fees provision. And so all of a
9 sudden a case that seemed unlikely -- just because it's a bad
10 contract doesn't make it fraud. I said this from the beginning
11 of this case.

12 Then people get all spun up and then they think: Well, at
13 least I can show that you didn't -- even though the jury
14 instructions will say this isn't a breach of contract case --
15 and it's not -- I mean, there's grounds to prosecute a case
16 where at least you get something. Right? Assuming, you
17 know -- I just assumed. I don't know. It's enough for me to
18 focus on all the papers. It's hard to go through volumes and
19 volumes and volumes of exhibits. That's why none of us does
20 it.

21 And so, again, I've looked at the Rule 26 issues, but I
22 haven't looked at whether it's grounded in an evidentiary
23 basis. And I have to think that people with knowledge can
24 testify about monies they paid. At least something. You know,
25 even if it's not -- and I'll say again; then I'll stop because

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1 you're the guy trying -- you are the people trying the case.
2 But I know how jurors work. And if they think that someone
3 didn't do their job, there's always the -- and the behavior was
4 bad enough and the representations up-front, the fraud in the
5 inducement was concrete enough, the jury votes for you, even if
6 they don't return \$16 million in lost profits because I'm not
7 letting in that information. And so that's -- and we're still
8 here.

9 I mean, I tried to get people along the way to consider
10 settlement. And I know you guys have tried.

11 So Mr. Susman wanted to say something first, and Mr. Kieve
12 wants to say something too.

13 **MR. SUSMAN:** What I would suggest, Your Honor -- I
14 mean, I clearly understand where you're headed, which, first, I
15 would like to put on a proffer. Put him on the stand and
16 proffer his testimony --

17 **THE COURT:** Okay.

18 **MR. SUSMAN:** -- on damages, because this is going --
19 this will go up.

20 **THE COURT:** That's totally fine. I mean, I don't want
21 to inconvenience you by having --

22 **MR. SUSMAN:** I thought it would be better to hear his
23 testimony --

24 **THE COURT:** Okay.

25 **MR. SUSMAN:** -- and then get your ruling.

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1 **THE COURT:** Okay.

2 **MR. SUSMAN:** And, you know, obviously, we're not going
3 to trial for -- you've cut us down to -- we need to figure a
4 way to make it so we don't have a trial and we can take it up
5 on appeal. Because, frankly, that's where we're headed because
6 it doesn't make sense for you or the Court.

7 And we just -- I mean, we have a strong disagreement with
8 Your Honor on the law. And I think that's fair. That's why
9 there's someone else, there's another place we can take this
10 dispute to.

11 And I think that would be Mr. Fallis' choice, to simply
12 put his damage testimony on as best -- you know, let him make a
13 proffer. You rule you're not going to let him testify.

14 **THE COURT:** If he makes a proffer, they get to
15 inquire; right?

16 **MS. RAY:** And we would need to prepare for that.

17 **MR. SUSMAN:** They could --

18 **MS. RAY:** I'm not ready to do that today --

19 **MR. SUSMAN:** -- absolutely inquire.

20 **MS. RAY:** -- obviously.

21 **MR. SUSMAN:** Absolutely.

22 **THE COURT:** Okay.

23 **MR. KIEVE:** Your Honor --

24 **MS. RAY:** And we need to know --

25 **MR. KIEVE:** -- can I make a response, please?

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1 **MS. RAY:** Can I just make sure I clarify and
2 understand --

3 **MR. KIEVE:** Can I make a response, please?

4 **MS. RAY:** -- what we're talking about here?

5 (Simultaneous speaking; court reporter interrupts.)

6 **MR. SUSMAN:** The best way to tell an appellate court
7 what has happened here --

8 **THE COURT:** Well, I think it's great for an idea.

9 **MR. SUSMAN:** -- is to put on -- it's not going to take
10 more than 15, 20 minutes at the most -- to put that on, let you
11 hear it, and then rule as you wish.

12 And then, you know, we'll figure -- then maybe there's a
13 way we can work with you in a way that will avoid a trial but
14 allow us to go up on that issue.

15 **THE COURT:** There's no magic for the trial happening
16 tomorrow. That's Point 1. Right? I mean, there's no magic,
17 although we have the time set for it. But, of course, the
18 proffer comes first.

19 So if it doesn't work out -- I don't know how it would
20 work out -- certifying an issue on damages. I just don't know
21 how that would work.

22 **MR. SUSMAN:** Let me mention something.

23 **THE COURT:** Summary judgment on damages? Something
24 like that?

25 **MR. SUSMAN:** I understand what you're doing. You're

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1 trying to make us settle the case.

2 **THE COURT:** No, I'm actually really not.

3 **MR. SUSMAN:** Your Honor --

4 **THE COURT:** I'm really not.

5 **MR. SUSMAN:** Your Honor, you keep referring to a
6 provision for attorney's fees, which has no -- it's not
7 threatening to Grouse River at all. Grouse River --

8 **THE COURT:** I thought it was incentivizing.

9 **MR. SUSMAN:** No. Grouse River is out of business.

10 **THE COURT:** No. I know that.

11 **MR. SUSMAN:** You know, they can get the biggest
12 judgment in the world -- 25 million, 100 million,
13 150 million -- against Grouse River Outfitters. God bless
14 them. Okay? They will never -- I mean, this is a business.
15 What are they going to do? They can go to Canada and try to
16 collect against Grouse River which has nothing.

17 So that idea, our only hope is to -- if the Court rules he
18 can't testify to his real damages, our only hope is to go up on
19 appeal. And moving it to another time is not going to do any
20 good unless Your Honor says: Well, if they have some
21 opportunity to cross-examine him on all his testimony, that
22 might cure something. That would do some good.

23 But just, if you're going to -- moving it three months and
24 having you make the same ruling --

25 **THE COURT:** No, no, no.

1 **MR. SUSMAN:** -- is just not going to help us.

2 **THE COURT:** I just meant what Ms. Ray said.

3 **MR. SUSMAN:** We are locked into this position. I
4 mean, clearly, you know, the lawyers are locked in. We have a
5 fiduciary obligation to be here. This is being funded by a
6 litigation funder, the out-of-pocket --

7 **THE COURT:** I did not know that.

8 **MR. SUSMAN:** -- expenses.

9 You know, we have a bull by the tail, so to speak. And
10 the client feels he's been damaged, feels that he's been
11 wronged, and he has real damages.

12 And I believe we will get him his damages someday. May
13 not -- we may have to go up to the circuit court to do that,
14 which is fine, but let us make a record now --

15 **THE COURT:** Totally fine.

16 **MS. RAY:** -- of what that is.

17 If they want to cross, God bless them. Let them cross.

18 And then the Court of Appeals will exactly know what you
19 excluded, if you exclude it after listening to him. That's all
20 I'm asking.

21 **THE COURT:** Okay. That makes good sense. Just a
22 couple of points.

23 Well, Mr. Kieve wants to say something.

24 **MS. RAY:** Yeah, I'd like to respond to that as well.

25 **THE COURT:** Let's just give me a second, though, and

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1 then -- I will say this: I'm not trying to get the case to
2 settle. I love trials. I would just say -- and maybe this is
3 me -- in the lost profits landscape, I have trouble with -- I
4 had trouble with the expert report here.

5 And I always said, maybe he could establish the foundation
6 to talk from a business perspective. And a hundred percent --
7 see, of course, this is me as a former -- I mean, I used to try
8 cases. I always think that -- and I said this from the
9 beginning. He can talk about what happened. He can talk about
10 the product, what was promised, what was contracted for, what
11 was delivered. And that doesn't mean it's fraud, but it does
12 illustrate the wrong that was visited.

13 But what we are talking about here is damages. And your
14 idea of a proffer is good one.

15 **MR. SUSMAN:** Of course. And, Your Honor, there are
16 two separate --

17 **THE COURT:** I already said he can proffer anyway.

18 **MS. RAY:** Well, I'd like to respond, because this is
19 an issue. I don't know what categories they would even be
20 admitted -- or permitted to make a proffer on, and that's what
21 we need to understand.

22 But here's the thing. With regard to lost profits, it's
23 still a Rule 26 problem. There is no disclosure. There is no
24 other disclosure for lost profits in this case other than
25 McEwen's numbers. That was it. So there is no disclosure that

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1 they could possibly come forward with with regard to lost
2 profits.

3 **THE COURT:** So when I look at the sales delta, which
4 assumes, without basis, I would say, that Grouse River's
5 revenue would have grown --

6 **MS. RAY:** That's revenue, Your Honor.

7 **THE COURT:** -- million dollars per year --
8 No. I was excluding it. I'm excluding it --

9 **MS. RAY:** Right.

10 **THE COURT:** -- as inadequate.

11 **MS. RAY:** Right.

12 **THE COURT:** You win on this point. You win on this
13 point.

14 And then sums it and multiplies it by 35 percent without
15 explanation, I was just like, that's a lump-sum figure and I
16 don't know how it stands up under the Ninth Circuit case law.
17 I really don't.

18 **MR. KIEVE:** May I respond, Your Honor?

19 **THE COURT:** I'm happy to hear the proffer.

20 **MR. KIEVE:** May I respond, Your Honor?

21 **MR. SUSMAN:** Let's put him --

22 **THE COURT:** Yes.

23 **MS. RAY:** No. Your Honor, that's -- if it's not a
24 lost profits disclosure --

25 **THE COURT:** Then it doesn't come in under Rule 26.

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1 **MS. RAY:** Right. So then we don't need a proffer. We
2 know that it's not a lost profits disclosure.

3 **THE COURT:** I understand, but --

4 **MS. RAY:** So we don't need a proffer because it
5 doesn't -- it is self-executing. There is no disclosure of
6 anything.

7 **THE COURT:** I completely agree. I wonder --

8 **MR. KIEVE:** May I respond, Your Honor?

9 **THE COURT:** Yes. I wonder -- and, again, maybe it's a
10 waste of time. And that's fair.

11 **MS. RAY:** And I want to make that point too, please.

12 **THE COURT:** Yes.

13 **MS. RAY:** This is incredibly prejudicial to the client
14 that has all of its witnesses flown here, ready to start a
15 trial that we have spent all of this time. This is a new --

16 **THE COURT:** I feel that it's unlikely that I'm going
17 to change my mind on the lost profit aspect of things for the
18 reasons that you advanced.

19 And so -- and I wonder -- and, again, I'm not thrilled
20 about -- you promised 15 to 20 minutes of a proffer. Remember,
21 in my pretrial order -- again, this is before the Rule 26
22 issues -- I said he's got to say what he's going to testify
23 about before he talks --

24 **MS. RAY:** Which is why --

25 **THE COURT:** -- about it.

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1 MS. RAY: -- we raised the Rule 26 issue --

2 THE COURT: Right.

3 MS. RAY: -- because we knew that there was nothing --

4 THE COURT: It was --

5 MS. RAY: -- we could possibly do.

6 THE COURT: It was a good idea. And it looks like you
7 win.

8 MS. RAY: Okay.

9 THE COURT: I mean, I'm not -- I wonder, if you
10 promise me 15 minutes of testimony --

11 MR. KIEVE: Hold on. Just a second. Just a second.
12 May I respond, Your Honor?

13 THE COURT: Sure.

14 MR. KIEVE: I come from a court background on the
15 East Coast, and we only have one podium up in front of
16 the Court. And there's a reason for that. Only one lawyer
17 gets to talk at a time.

18 And the notion that somehow -- I was making a presentation
19 to you, and Ms. Ray just highjacked that. I'd like to finish
20 my presentation on this lost profit issue, if I could, please.

21 THE COURT: Sure.

22 MR. KIEVE: Thank you very much.

23 THE COURT: I will just assume some responsibility for
24 that myself because I do tend to view case management,
25 including trial case management, as more of a -- as slightly

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1 more informal. And none of us should -- we should not be
2 talking over each other, if only for our court reporter, who
3 I'm sure probably wants to throw water at all of us.

4 Okay. Next.

5 **MR. KIEVE:** So you had asked me to set the stage. You
6 had asked me to explain why I believe your preliminary view
7 that seems to be hardening is incorrect.

8 **THE COURT:** Okay. I'm interested in hearing this.

9 **MR. KIEVE:** Rule 26 disclosures are designed, quote,
10 to give the other side an idea what the case is all about so
11 that they can then consider settlement. That is the express
12 purpose of this case. It is not to set forth every chapter,
13 verse, iota, footnote of a damages computation.

14 We gave them, on December 28th or December 29th, 2017, the
15 backup for the testimony and the specific chart that Mr. Fallis
16 testified to on May 17th -- or May 19th, rather, of 2017. We
17 gave it to them. It is this set of Excel spreadsheets. It
18 sets forth a methodology, a calculation, a computation of his
19 damages.

20 That is all that the rule requires, period. The rule
21 requires nothing more.

22 It is then incumbent upon the other side to take a
23 deposition, as Mr. Gattey did when he first saw this. He said,
24 tell us about our damages. He continued the deposition. We
25 gave him -- he specifically asked, let us see the chart; let us

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1 see the Excel spreadsheet. We gave it to him. And the rest
2 was silence.

3 And under those circumstances, we have completely complied
4 with every single Rule 26 obligation we possibly could have
5 had.

6 Not only that, but we didn't just sit back. We gave them
7 a supplemental set of interrogatory answers that specifically
8 set forth the same damages computation and specifically
9 referenced Mr. Fallis' Excel spreadsheet.

10 We gave them another set of specific ones after we
11 tendered Mr. McEwen as a witness, and we said: These are our
12 damages, and in addition, these are the McEwen damages.

13 So there is no question in anybody's mind. Their own
14 expert refers to the Excel spreadsheet in his own report.

15 And so in terms of Rule 26, this should be an easy case.
16 This should be a just "wake up in the middle of the night and
17 say aha," no question about it. We gave it to them. They had
18 it. They did nothing about it.

19 And I believe that it is really fundamentally an issue of
20 reversible error if you do not let us put on damages that we've
21 told about.

22 **THE COURT:** Well, so from a Rule 26 perspective, let's
23 talk about from the second point that Ms. Ray makes, which is
24 an evidence perspective, that there is no evidence that's in
25 the -- for example -- and it's chump change for the

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1 out-of-pockets paid to NetSuite. I understand that. So what
2 you're -- the big bang for the buck in your lawsuit is your
3 lost profits.

4 **MR. KIEVE:** And that --

5 **THE COURT:** And you can't just say: I have 60 million
6 in lost profits; pay me. You have to predicate that ask on
7 specific evidence. And the allegation here is there's not
8 only -- okay. There's a Rule 26 argument. But there's also an
9 argument that there's no disclosure of any of the predicates
10 for reaching that conclusion, evidentiary predicates for --

11 **MR. KIEVE:** And can I make a --

12 **THE COURT:** -- reaching that conclusion.

13 **MR. KIEVE:** -- response to that, Your Honor?

14 **THE COURT:** Yeah. Because they've given you -- I'm
15 interested in your response, but just to go to Mr. Susman's
16 point earlier -- again, I haven't really thought about this.
17 You proposed in your motion entering judgment in your favor
18 based on -- there may be something we could orchestrate to
19 enter judgment. I have no idea what that looks like, but I'm
20 just following up on your earlier point, assuming I stick with
21 my opinion and don't change it.

22 All right.

23 **MR. KIEVE:** May I respond to --

24 **THE COURT:** Yes.

25 **MR. KIEVE:** -- the lost profit analysis?

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1 That is set forth specifically -- again, looking back to
2 the purpose of Rule 26, the purpose of Rule 26 is to give the
3 other side advance notice of the damages and calculations.
4 They have -- we have done that. They've had that for over two
5 years.

6 So let me finish, please.

7 **THE COURT:** Okay.

8 **MR. KIEVE:** The numbers are set in there in terms of
9 how it's calculated, and I'm prepared to put Mr. Fallis on to
10 show you how that profit number is sustainable.

11 Now, if they don't want to hear him, that's fine. I've
12 made my proffer, but let me explain one thing if I could,
13 Your Honor.

14 **THE COURT:** Okay.

15 **MR. KIEVE:** The methodology is implicit in the
16 calculations in the Excel spreadsheet.

17 This fundamentally, Your Honor, as I hope you recognize
18 having been a trial lawyer for many, many years, is the
19 following: This is a matter of weight. It's not a matter of
20 admissibility of evidence. They can whale all over Mr. Fallis
21 as much as they want.

22 "Mr. Fallis, do you have any support for this? Do you
23 have any support for this?"

24 In terms of computations like this, having supplied them
25 with the underlying documents, we do not have to bring those

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1 documents and make them admissible in court. We've given them
2 the documents. Under the rule, the computations are there.

3 They can bring the documents. If you want, we can bring
4 the documents. But all you have to do is, quote, make them
5 available. They have all the financial information already in
6 spades, in clubs, in diamonds, and in hearts.

7 And so in terms of that issue, I believe the fundamental
8 issue is, first of all, this is a Rule 26 motion. It's not an
9 evidentiary motion.

10 **THE COURT:** But I did say that before testifying about
11 any of this stuff, even leaving aside the Rule 26 issue,
12 there's the foundational issue of whether he had the
13 understanding to opine on the issue of lost profits at all,
14 which I highly doubt --

15 **MR. KIEVE:** Excuse me, Your Honor.

16 **THE COURT:** -- because it seems like if he wanted
17 to --

18 You finish.

19 And then you wanted to say something. Yes.

20 **MR. SUSMAN:** Your Honor --

21 **THE COURT:** These are two different issues. I
22 recognize these are two different issues.

23 **MR. SUSMAN:** They are two different issues, and that's
24 why I suggest that the proffer deals with both. It allows
25 another court to understand what it was that was disclosed, to

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1 rule as a matter of law whether that was enough to comply with
2 Rule 26, and it also allows Your Honor and another court to
3 determine the second issue, which is: Has he complied -- have
4 we complied when we tendered him?

5 We cited a Seventh Circuit case for the proposition that
6 an owner of a business can testify as to lost profits as long
7 as you dot the I's and cross the T's. We read that case, we
8 read every case cited in that case, and we believe that this
9 testimony that you are about to hear fully satisfies what
10 the courts have held is required before an owner can get on the
11 stand and say: In my opinion, my business lost X amount of
12 money, lost profits.

13 And so, but when we have a record, then we'll have a
14 record. You can rule on the basis of that record. And we can
15 take that up and put it before the court. And they're going to
16 have to rule, as a matter of law, that's either sufficient or
17 not. And we may be back someday. The case, you know, it's not
18 going to go away.

19 **MS. RAY:** May I be heard?

20 **MR. SUSMAN:** We're in a situation where we can't make
21 it go away. So I'm just suggesting, please let us make a
22 record of tendering his testimony. I'm sorry. I know you
23 would like to rush us through this.

24 **THE COURT:** No. No, I don't. That's not it at all.

25 **MR. SUSMAN:** But this is --

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1 **THE COURT:** I'm just trying to figure out what's going
2 on.

3 **MR. SUSMAN:** No. I mean, but --

4 **THE COURT:** That's all I'm trying to do.

5 **MR. SUSMAN:** -- I think we are entitled to put this
6 on.

7 If you persist in your ruling after we put it on, we then
8 have to figure a way to avoid a trial, which we are fine to
9 talk to you about, but we want to preserve this point. But we
10 need to make a record.

11 And my hope is that once you listen to the testimony, you
12 will reconsider perhaps. I mean, that's the whole point of
13 courts. Right? To hear testimony. And I don't think it's
14 fair to him to send him back to Canada with zero without
15 listening to how he calculates his damages.

16 **MS. RAY:** May I respond?

17 **THE COURT:** Yes, of course. I just want to say one
18 thing for my record.

19 I most definitely am not trying to rush you. It is not my
20 style. It is not my intention.

21 **MR. SUSMAN:** Thank you.

22 **THE COURT:** I'm curious why you resist the idea of a
23 proffer as prejudicial. I am just curious about that. And so
24 why don't you tell me that.

25 **MS. RAY:** Well, what I said originally was we would

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1 need to know what categories he is going to proffer, to present
2 a proffer on.

3 And the reason why we believe it is prejudicial to even be
4 moving forward discussing lost profits is that in this case,
5 Grouse River has put forward one, exactly one, disclosure of
6 lost profits, and that was Mr. McEwen's.

7 There is nothing, not -- the word "lost profits" does not
8 occur in this spreadsheet that we have now suddenly seen at the
9 last minute in this courtroom and is not on the exhibit list.
10 This is -- there's no calculation, there is no computation of
11 lost profits that has been disclosed other than Mr. McEwen's.
12 Therefore, Rule 26 --

13 **THE COURT:** Well, even his lost profits were
14 predicated on the assumptions that were drawn by --

15 **MS. RAY:** Yes.

16 **THE COURT:** -- Mr. Fallis.

17 **MS. RAY:** He tried to do a methodology based on the
18 projections by Mr. Fallis. But he did a methodology. He did a
19 contribution margin analysis. There's lots of reasons why it
20 was flawed and inadmissible. We obviously think that that was
21 the right outcome.

22 The point is, that was the only disclosure of any
23 computation related to lost profits in this three-year case.

24 **MR. KIEVE:** That is --

25 **MS. RAY:** And this is lost revenues.

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1 And they want to now come in at literally the 11th hour,
2 the day before trial or the day of trial, and then they want to
3 say: We know we never disclosed this, but here, he's here.
4 Don't send him back to Canada. Let him go on the stand and say
5 something new that no one has ever disclosed in this case.

6 **THE COURT:** But then we're right back to Rule 26.

7 **MS. RAY:** It is Rule 26.

8 **THE COURT:** Right. And then nothing changes.

9 And, again, tell me -- let's just assume you're right.
10 I'm going to write an order that says Rule 26, you win.

11 And the request -- the ask here, which is relevant to the
12 second part of it, which I previously said, well, maybe the CEO
13 can lay a foundation for some damages beyond the fixed
14 out-of-pockets.

15 **MR. KIEVE:** Can I ask a question, Your Honor?

16 **THE COURT:** And so I wonder what the harm in that is
17 from your perspective. Because at the end of the day, you
18 probably will still get your same order, and it's just a
19 record. And so then I just wonder why you resist it, because I
20 just figure I must be missing something.

21 **MR. KIEVE:** Can I ask a question?

22 **THE COURT:** Could I finish with Ms. Ray first, because
23 I'm interested in hearing her response. Because I'm not --
24 allowing the proffer doesn't --

25 **MS. RAY:** So they're going to put in a record of a new

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1 number that has never been disclosed in three years the day
2 that trial was supposed to start.

3 **THE COURT:** Right.

4 **MS. RAY:** Why? Because the only thing that they can
5 appeal --

6 **THE COURT:** It's the same number.

7 **MS. RAY:** What they can appeal is your exclusion of
8 McEwen.

9 **THE COURT:** Right.

10 **MS. RAY:** That's a proper appellate record, and
11 that's -- and they can take that appeal.

12 **THE COURT:** Yes.

13 **MS. RAY:** They can appeal your decision that they
14 didn't properly disclose any other lost profits number.

15 **THE COURT:** Right.

16 **MS. RAY:** That, also.

17 **THE COURT:** But it's hard to do it interlocutory. I
18 mean, that's another issue that --

19 **MS. RAY:** No, no. I'm just saying, whenever judgment
20 is entered, those are, I think, entirely defensible rulings,
21 given the record, and that is what they could appeal.

22 I don't understand why they get to come in and say: Okay.
23 Rule 26 applies. We don't have anything else. But
24 nevertheless, let us put on a record so that we can go talk to
25 another court about that.

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1 **THE COURT:** I understand. It really would be so much
2 better if the lawyers would make the proffer, and not --

3 **MR. KIEVE:** May I --

4 **THE COURT:** Yeah. Because the Rule 26, it really
5 doesn't make any sense. I'm just going to say, I want to be
6 encouraging and helpful. And in the Rule 26 context, it really
7 doesn't make any sense. But you can make a proffer yourself,
8 but I don't know why we would want testimony on the point.

9 **MR. KIEVE:** There are two points here.

10 **THE COURT:** It's also cleaner.

11 **MR. KIEVE:** You know, there are rules, and there are
12 rules called the Federal Rules of Civil Procedure. And I --
13 our disclosures with this spreadsheet satisfies every single
14 requirement of any case I've ever seen in my entire life about
15 what you're required to disclose.

16 **THE COURT:** I mean, tell me what I'm missing about
17 this reaction that I've had to the lost gross profits, which is
18 the big one.

19 **MS. RAY:** It's revenue. It's not profits.

20 **THE COURT:** Revenue. Exactly. No, no. No, I know
21 that.

22 **MS. RAY:** That's the whole point.

23 **THE COURT:** But the point is, that's what they're
24 going for, and it just -- it's just assuming revenue growth and
25 then multiplying it without explanation.

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1 **MS. RAY:** And lost revenue is not recoverable under
2 the law --

3 **THE COURT:** Understood. Understood.

4 **MS. RAY:** -- under any -- and they cite --

5 **THE COURT:** I'm agreeing with you.

6 **MS. RAY:** Right.

7 **THE COURT:** I'm agreeing with you. Just, maybe I'm
8 not doing a good enough job saying that, but I'm agreeing with
9 you.

10 And I just don't see how under any set of rules, I'm
11 missing the boat, being skeptical of the damages that you put
12 in, not only from the disclosure, but just because are they
13 damages at all? And it's just -- it was -- the expert was
14 shaky, to begin with, because of the predicates for what the
15 expert's conclusions were drawn on.

16 **MR. KIEVE:** Your Honor, I believe I got my numbers
17 mixed up, but there is the *ISDN* case that we cited in our
18 penultimate filing. And the Court of Appeal, in that case, the
19 Ninth Circuit, the court -- the lower court excluded an expert
20 witness. The case went to trial based upon the testimony of
21 the founder and CEO of a company under the foreseeability test.

22 And let me emphasize, this is a case under the California
23 Commercial Code, because there's no question that this is a
24 sale of goods. Software has been determined by the Ninth
25 Circuit and this Court and the Southern -- excuse me -- the

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1 Central District to be the sale of goods.

2 And so the damages are those that are reasonably
3 anticipated as flowing from the harm that was caused. It's not
4 necessarily a lost profits analysis. That's the fundamental
5 issue we're talking about here. It is: What are the
6 reasonably foreseeable losses?

7 The fact of the matter is, we have told them. The
8 calculations have been in there since Day One, and they simply
9 did nothing about it. This is their problem, and this is why
10 they are so panicked about it. They're now coming to trial on
11 something that they conducted absolutely no discovery about.

12 So let me just back it up again. The key point is that
13 Mr. Fallis is prepared to testify and we will show you the
14 following.

15 **MR. SUSMAN:** Let him do it, please.

16 **MR. KIEVE:** Are you prepared to allow --

17 **THE COURT:** No. I think I've changed my mind. I
18 mean, I don't see any utility, in a Rule 26 disclosure motion,
19 for allowing the testimony. I just don't see it because the
20 issue is disclosure. If I'm wrong on that, take me up on it.

21 And then the issue then just -- and then the issue
22 becomes, there's the expert and the adequacy of the Rule 26
23 disclosure. So we should talk about whether they were or
24 weren't adequate. We should talk about that.

25 And then, after that, if there's anything left that he can

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1 testify about, that's the proffer that needs to be made if he's
2 going to testify beyond the confines of the Rule 26 order that
3 I'm prepared to issue.

4 So that's the right way to do it.

5 I'm interested, and so I'm always happy to hear what the
6 lawyers have to say. And it doesn't make any sense to have
7 that testimony. So that's the right answer on the Rule 26
8 issue.

9 Then we just come right back to where we are.

10 **MS. RAY:** And so where we are is we have three small
11 categories of damages, and they're saying they don't want to go
12 to trial on those damages.

13 **MR. SUSMAN:** We have not said that.

14 **THE COURT:** Then I think what we need to do -- I don't
15 want to hear any more argument about it. I wrote an order
16 before, as much as I could. It will take me a very small
17 amount of time to finalize it. I could file it. I could bring
18 it back out to you. You guys decide what you want to do,
19 because we do have a jury who is calling in --

20 At what time, Elaine?

21 **THE CLERK:** They have to call by 4:00.

22 **THE COURT:** Okay. It's 2:15. So we have to -- I'm
23 quick. And I -- yeah. So I -- and I totally respect you as a
24 lawyer, and I don't see the grounds for the proffer. I don't.
25 They're correct.

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1 **MR. SUSMAN:** Your Honor, I agree with you that insofar
2 as the sufficiency of disclosure is concerned, that the Court
3 needs to look only at the disclosure.

4 **THE COURT:** Correct.

5 **MR. SUSMAN:** The paper disclosure.

6 **THE COURT:** The question after that is: What's left?

7 **MR. SUSMAN:** And the question after -- it's an
8 important question, because it doesn't do us any good to get --
9 have a case come back because a court says the disclosure was
10 sufficient and then have you -- I mean, I'm talking about the
11 efficient administration of justice, when you can make a record
12 of a proffer that you can then see whether he is capable of
13 testifying, he has the qualifications to testify on these
14 things.

15 And because we come back and the Court would say that the
16 disclosure's proper; then they still have their other objection
17 but he can't testify on it. You know, I just think it's so
18 easy to do it now, get a complete record for the Court of
19 Appeals. They got two grounds then to knock it out.

20 **THE COURT:** Well, so I have another idea, but I don't
21 know if it's a good one. But there are ways -- I said this
22 before, I thought, because we have been struggling with how you
23 define the case from the beginning.

24 It was a very big complaint, too much, I mean, and
25 figuring out what did or didn't sound in fraud in the

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1 inducement. And now we're down to damages and what does the
2 damages case look like.

3 And I have done, in other cases, damages summary judgment
4 motions. So there may be a way to queue it up. I have no
5 idea, but there may be some way to queue up a damages issue.
6 But I mean, I don't know.

7 I mean, and so I'm disagreeing and I'm not saying this
8 should happen before any appeal depending upon -- I haven't
9 figured out what this looks like structurally. But there
10 might -- but it's not -- there doesn't have to be a trial to
11 determine whether the proffered evidence is sufficient to prove
12 a case as a matter of -- I don't know -- as a matter of fact.

13 **MR. KIEVE:** Your Honor, can I raise one point here, if
14 I could?

15 **THE COURT:** Yeah.

16 **MR. KIEVE:** It really is a question of procedural
17 fairness. And let me explain why.

18 We're dealing with what are considered to be discovery
19 rules, Rules 26 and the like. We went through this entire
20 course. We came up -- the discovery deadline has come and
21 gone. The court rules say that you're not permitted to make
22 any discovery motions after the discovery deadline has come and
23 gone.

24 **THE COURT:** There's an ongoing duty to supplement your
25 Rule 26 --

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1 **MR. KIEVE:** Let me finish, Your Honor.

2 At some point the duty to supplement stops, and I would
3 suggest that at the least --

4 **THE COURT:** But they said they got a PowerPoint from
5 you, which is your demonstrative evidence which is going to go
6 along with Mr. Fallis' testimony, and they got it last
7 Thursday. So what are they supposed to do when there's a whole
8 new damages theory, they say, that's propounded on the eve of
9 trial? They're not supposed to be trials by ambush.

10 The whole point of damages disclosure is to sort of
11 illuminate what your theory is, knock out what you can't put
12 in, e.g., the expert motion, and then put in whatever evidence
13 you have, presumably listed on the evidence list, about
14 concrete out-of-pockets.

15 **MR. KIEVE:** May I respond?

16 **THE COURT:** Yes.

17 **MR. KIEVE:** This is a Rule 26 motion. Discovery was
18 long since closed. The court's rules say you cannot bring a
19 discovery motion after discovery has closed unless you timely
20 notice it.

21 In addition --

22 **THE COURT:** You're not allowed to change your damages
23 theory at the last minute either.

24 **MR. KIEVE:** -- you set an order that said you have to
25 file your motions in limine by way back when in May. That has

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1 come and gone.

2 We've had a final pretrial conference, and the final
3 pretrial conference order governs under Rule 26.

4 There's been no manifest injustice here. And they
5 basically threw this thing over the transom.

6 And, by the way, we gave them our damages number on
7 Thursday. They filed their motion the preceding Monday. And
8 so I'm scratching my head, saying: Why are we sitting here,
9 after discovery has closed, after the time for them to complain
10 about a Rule 26 disclosure?

11 And the bottom line is, they are complaining because they
12 had a document that clearly explained exactly what our damages
13 were back in May of 2017. We gave them the full Excel
14 spreadsheet in December of 2017, and they did nothing about it.

15 **THE COURT:** I mean, again, I feel like a broken
16 record, but the point of Rule 26 disclosures is not just
17 nailing a number to a spreadsheet. It's providing the basis
18 for the conclusions. And that's what we're lacking here,
19 looking at the so-called lost profits which actually are
20 revenues.

21 **MR. KIEVE:** They are, in fact, not, Your Honor. They
22 are, in fact, lost profits. And that is our proffer.

23 **THE COURT:** Well, they're projected -- lost projected
24 revenues. I understand the proffer you're advancing.

25 **MR. KIEVE:** They are, in fact, recoverable lost

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1 profits under California law.

2 **THE COURT:** Well, I think that the best thing -- well,
3 there's also -- well, so I think the best thing to do is for me
4 to issue -- like you guys said, relax here in the courtroom,
5 for me to finalize and file my Rule 26 order, bring it out to
6 you in hard copy for you to read it, digest it and consider
7 what you want to do.

8 **MR. KIEVE:** Fair enough.

9 **MS. RAY:** Thank you, Your Honor.

10 **THE COURT:** Mr. Susman, then you'll see what's left.
11 It doesn't end today. It just ends the Rule 26 conversation.

12 **MR. SUSMAN:** No. I understand that. But if you're
13 not going to let the testimony come in on Rule 26 -- what I'm
14 trying to do is make a proffer of what his testimony would be
15 so that you will keep it out on two -- my suspicion is, if we
16 satisfied Rule 26 --

17 **THE COURT:** I'd kick it anyway.

18 **MR. SUSMAN:** Yes, that's my suspicion. Okay? And
19 that's what you have said on the record, basically.

20 **THE COURT:** It concerned me as being overly
21 speculative.

22 **MR. SUSMAN:** I understand that, Your Honor, and -- I
23 understand that. I'm not going to -- you're going to rule and
24 you're going to rule. But we live, thank God --

25 **THE COURT:** I'm so happy for the Court of Appeals.

PROCEEDINGS

1 **MR. SUSMAN:** We have a remedy.

2 **THE COURT:** Yeah. I don't mind being wrong.

3 **MR. SUSMAN:** But we need --

4 **THE COURT:** So I want you to tell me that I'm wrong.

5 **MR. SUSMAN:** But we need to have a record. And I'm
6 just saying, let's take the time to make a record of what his
7 testimony would be so then the Court of Appeals, they may
8 affirm you on the Rule 26; they may reverse you; and they may
9 affirm you on he's not capable of making that testimony, even
10 if he had complied with Rule 26; or they may reverse you.

11 So, in any event, we can get the case over; we can get
12 this issue behind us. If they affirm you on both grounds, case
13 is over. Right? I mean, it's done. You don't want to see
14 this case come back to you.

15 **THE COURT:** I would be so happy to see the case tried.
16 I would be -- I'm really looking forward to how you guys would
17 try it. I think it would be great. I think you'd do a
18 fantastic job. You're great lawyers, and I know it would be
19 really fun to watch. And from the beginning, I've known that.
20 Before you came in this case, I thought Mr. Kieve was going to
21 prosecute it. I knew how he was going to do it, and he's all
22 excited about doing it, and I think that's fun. And I always
23 learn a lot, and I become a better lawyer, not just a better
24 judge, from watching the trial. So I am so happy for a case to
25 go to trial. I really, really am.

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1 I've always been concerned -- and maybe people -- and I
2 also believe, because, you know, I'm a rules-of-the-road
3 person. And I've always believed that if a bad actor is
4 shown -- I mean, I've had cases with zero economic damages that
5 have had seven-figure verdicts returned because of the bad
6 actor. So I never -- I always thought on some level it didn't
7 matter. I always knew that if you had your case, you could
8 prosecute it.

9 **MR. SUSMAN:** Obviously, the most efficient thing in
10 the administration of justice is to let the trial proceed. You
11 can deal with a jury verdict however you wish to deal with it.
12 You'll have it all done. We have a one-witness case.

13 **THE COURT:** Two, because you've got their --

14 **MR. SUSMAN:** Yeah, an adverse witness.

15 **THE COURT:** Right?

16 **MR. SUSMAN:** I mean, but, you know, one witness and
17 with a commitment to get it done by Friday, you know, we are --
18 that would be the most efficient thing to do. But if you don't
19 want to do that, at least let us --

20 **THE COURT:** No. I do want to have the trial. I think
21 that's what we should do with what's left. That, I think, is
22 the way of queuing up the issues for appeal.

23 You are the one who suggested some kind of interlocutory
24 approach, which I thought let's do the order; you guys can
25 think about what you want to do. But my inclination is just to

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1 do the trial.

2 **MS. RAY:** Let's do the order, and then we can talk
3 about what goes next. And if we try the case, we try the case.
4 We're excited to try the case if they want to try the case.

5 But the point is, whether it's fun to try this case or not
6 has really no bearing --

7 **THE COURT:** "Fun" may be an overstatement. It's more
8 fun for me than it is for you.

9 **MS. RAY:** But it really has no bearing on the question
10 that's before the Court right now, which is whether there was
11 an adequate disclosure. And if there wasn't an adequate
12 disclosure, there's nothing to proffer.

13 **THE COURT:** And then the thing that drove this too,
14 which is my ruling -- which you may say was mistaken and you
15 will have your remedy -- that the expert report just wasn't
16 grounded in anything but speculation.

17 **MS. RAY:** Right. And frankly, the expert report was
18 relying on Mr. Fallis' predictions.

19 **THE COURT:** No. Exactly. No. Exactly.

20 **MS. RAY:** So all that we have is the same basis that
21 you excluded the expert report. So, again, there wasn't a
22 disclosure about that; but nevertheless, there would be no
23 point. And we just need to know what the remaining damages are
24 so that we can move --

25 **MR. SUSMAN:** Your Honor --

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1 **MS. RAY:** -- forward from that point.

2 **MR. SUSMAN:** Your Honor, the expert is not allowed to
3 do anything unreliable. And the Court is given, under *Daubert*,
4 the gatekeeping function there. So the jury, which would be
5 maybe overimpressed by an expert, the jury doesn't even get to
6 hear the expert.

7 With a lay witness --

8 **THE COURT:** I didn't exclude the expert. I just
9 excluded --

10 **MR. SUSMAN:** I understand.

11 **THE COURT:** -- part of it.

12 So I a hundred percent thought he was going to talk about
13 the concrete out-of-pockets, and that's what I thought was
14 going to happen.

15 **MS. RAY:** That's what everyone thought was going to
16 happen.

17 **MR. SUSMAN:** With a lay witness who's testifying, the
18 owner of a business, about his damages, the jury is the
19 gatekeeper. The jury determines whether that's credible or
20 not, whether the assumptions are there or not, whether the
21 assumptions are -- they can show -- claim this, but that's
22 cross-examination. The jury's determined to do that. And you
23 instruct them that they don't give damages on the basis of
24 speculation.

25 I mean, that's the whole point. Not the judge. The role

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1 doesn't --

2 **THE COURT:** That's why we're down to Rule 26.

3 **MR. SUSMAN:** The judge should not have a role. But we
4 can argue this on appeal too. That's a point too.

5 What role do you have with a business owner testifying
6 about, "I was hurt and here's how much"? What role do you have
7 that doesn't usurp the jury's role --

8 **THE COURT:** What I've always said --

9 **MR. SUSMAN:** -- to say, "I don't believe that"?

10 **THE COURT:** What I've always said is something like
11 this: Mr. Fallis can testify about what happened. He can
12 testify about the facts.

13 On Sunday, my house was standing. On Monday, it had
14 collapsed.

15 And how do you quantify that?

16 What I said so far is his lost revenue/profits argument
17 was not disclosed. With the expert, I said that wasn't -- the
18 conclusion was predicated on assumptions that were speculative.

19 How a jury chooses to quantify that harm, you have a lot
20 of grounds to ask for a number. Whatever number you ask for is
21 what you ask for. And what he gets to quantify as the damages
22 is the issue that we're talking about. And so your ask is
23 different from the fair scope of his testimony. So that's what
24 we're talking about here, leaving aside the Rule 26 issue.

25 So you don't get to argue damages that you haven't

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1 disclosed. It doesn't mean you can't quantify a harm in the
2 fraud context, because that's the whole point of a fraud
3 charge. It sort of allows people, if the jury finds scienter,
4 if they find fraud in the inducement, it allows them to hang a
5 number.

6 And there's a reason that I don't do those line-item -- no
7 one does those line-item verdict forms. The jury just fills in
8 the dollar amount.

9 So the way he describes his business, he gets to talk
10 about what happened. What I'm saying so far is, he doesn't get
11 to lay that 8 million number on it, or whatever it is. So
12 that's what I'm saying. So that's --

13 **MR. SUSMAN:** I have a suggestion.

14 **THE COURT:** Yes.

15 **MR. SUSMAN:** I have a suggestion.

16 **THE COURT:** I think you can try the case fine.

17 **MR. SUSMAN:** Huh?

18 **THE COURT:** I think you can try your case fine.

19 **MR. SUSMAN:** We're here, Your Honor. Suppose we did
20 something like this. I think you have the discretion to do it.
21 We try a liability case. We're here with the jury. I mean, if
22 the jury doesn't find for us on the first questions on your
23 verdict form, that there was fraud, the case is over.

24 If we get -- and you bifurcate and decide the damage issue
25 later, or to a different jury, and -- or say at that time we

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1 get nominal damages, you know --

2 **THE COURT:** So here's the thing about a trial. And,
3 again, I'm just --

4 **MR. SUSMAN:** Again, I'm --

5 **THE COURT:** -- thinking out loud.

6 Doesn't mean -- so fine, you try your case. You try your
7 liability and your damages case. And maybe in a trial you make
8 a proffer about what Mr. Fallis' testimony would have been.
9 And that's your record for appeal.

10 So I don't know, but that may be possible.

11 **MS. RAY:** Again, we're talking about fundamental
12 fairness here. We prepared this case for trial based on the
13 \$1.2 million --

14 **THE COURT:** I agree.

15 **MS. RAY:** -- that was left in the case after we got
16 through the three-year funnel that got down to the week before
17 trial.

18 We are prepared to try that case. That is the case that
19 they -- that they got us to. This is plaintiff's case.

20 **THE COURT:** They can file whatever proffer they want
21 as part of the public record. I don't have any control.

22 You're saying testimony is different. Fair enough. I do
23 agree with that.

24 Okay. So that's fine. You make a proffer, but it won't
25 be a testimonial proffer.

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1 **MS. RAY:** And we need your order so that we --

2 **THE COURT:** Yes, yes.

3 **MS. RAY:** -- know exactly what the damages are.

4 And we don't want to wait until --

5 **THE COURT:** No, no, no. Just give me --

6 **MS. RAY:** -- two weeks from now to do that.

7 **THE COURT:** No, no, no.

8 **MR. SUSMAN:** What was Your Honor suggesting? We can
9 try the case and then --

10 **THE COURT:** Try it. Try it. Try it. File anything
11 you want. Do a written declaration about what you would have
12 proffered. Make your record for appeal. What the Ninth
13 Circuit chooses to do with that is different. I don't have any
14 control what you decide to file on the public docket. So write
15 a declaration. I mean, that way -- I mean, I'm not telling you
16 that --

17 **MR. SUSMAN:** In other words, we -- I'm just trying to
18 figure -- I'm trying to think this --

19 **THE COURT:** I'm not going to issue a hypothetical
20 ruling. There's no case -- if I've excluded testimony on a
21 topic because of a failure to disclose it under Rule 26, that
22 ends my job. But if you want to supplement your record, for
23 whatever utility it gives you, you have the -- I suppose you
24 have the tools to do that. I just don't have to do it by way
25 of testimony.

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1 **MR. KIEVE:** Can I give you a chambers copy of what we
2 filed over the weekend?

3 **THE COURT:** I read it.

4 **MR. KIEVE:** Would you like the chambers copy?

5 **THE COURT:** Thank you. It's so nice of you to bring
6 me the chambers copy. I've already printed it. Thank you. It
7 was nice of you to offer.

8 **MR. SUSMAN:** So let me think about this. When we go
9 to trial -- I'm just trying to think of the most efficient way
10 to do this. We go to trial. The jury --

11 **THE COURT:** I precluded testimony on a topic.

12 **MR. SUSMAN:** Yeah, you precluded testimony on a topic,
13 which means -- I don't know what, but we'll proffer the
14 testimony on damages, obviously, outside the presence of the
15 jury.

16 **THE COURT:** Or maybe just do a declaration.

17 **MR. SUSMAN:** Maybe we'll write a Q&A and can proffer
18 it in that way. I'm not saying you have to listen to him. But
19 it would be outside the presence of the jury. This is what he
20 will testify.

21 **THE COURT:** And I don't mean to discount his
22 experiences. I'm sure they're sincere and heartfelt and all
23 that. He can still testify at trial about what happened. I'm
24 not precluding the "what happened" conversation.

25 **MR. SUSMAN:** No, no. I understand. He could testify

1 all that.

2 **THE COURT:** And all of that will be compelling,
3 presumably.

4 **MR. SUSMAN:** Yes. And then I think --

5 **THE COURT:** He gets to show that the product didn't
6 work too. I've not precluded that.

7 The issue, of course, in the end, is whether there's fraud
8 in the inducement. But he gets to talk about what happened
9 within the trial limits.

10 **MR. KIEVE:** Let me raise a question, following up on
11 Mr. Susman.

12 **THE COURT:** Yes.

13 **MR. KIEVE:** So we go to trial on whatever damages
14 you've let us get in under your Rule 26 motion that will come
15 up in five minutes. And let's assume we get a damages verdict.
16 Let's assume we get a punitive damages verdict. We then --
17 they can take it up on appeal, and we can take that up on
18 appeal on the damages that you didn't let us have.

19 **THE COURT:** If you choose to, right.

20 **MR. KIEVE:** Right? That's pretty simple.

21 **THE COURT:** It's a litigated point of reference. And
22 you guys can decide after your litigated point of reference
23 what you do, because if you -- right.

24 **MR. SUSMAN:** The only -- I wonder if we could get an
25 agreement from the other side that if an appellate court holds

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1 you are wrong on the damages, we only come back and retry
2 damages, not liability. That's my only concern. I don't think
3 you want to try this case twice.

4 **THE COURT:** Well, if you get a verdict on liability --

5 **MR. KIEVE:** The damages --

6 **THE COURT:** No. There's damages anyway.

7 **MR. KIEVE:** What?

8 **THE COURT:** If it gets affirmed -- well, you guys can
9 decide. You can decide whether you want to appeal. Well, you
10 would appeal. You decide what you want to appeal. Maybe
11 everything.

12 If the liability case sticks on appeal, which it should --
13 I mean, they're issues of fact -- and then you're back here
14 only trying a damages case anyway.

15 **MR. SUSMAN:** Yeah. I think that's -- that's maybe the
16 way to go.

17 **THE COURT:** Yeah. I think that will work.

18 **MR. SUSMAN:** And the only other thing -- again, just
19 let me just throw it out there because it is efficient. If we
20 went to trial and you submitted the damage issue to the jury
21 and -- because the damage testimony, it's not going to be that
22 long, then if -- and the jury is allowed to answer the damage
23 question, then on appeal -- I mean, you'll set it aside,
24 obviously, for the reasons which you should. I mean, if you --

25 **THE COURT:** No. I like that creativity, but no.

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1 **MR. SUSMAN:** You understand what I mean?

2 **THE COURT:** I understand exactly what you mean.

3 **MR. SUSMAN:** If you set it aside, then, then we go up
4 on appeal and you wouldn't have to do it again. You'd have the
5 answer.

6 **THE COURT:** I understand what you're asking, but
7 they're not going to want that because it's prejudicial.

8 **MS. RAY:** Exactly. Obviously, what's going on here is
9 that they are trying to win a punitive damages case.

10 Your Honor, you have the evidence. There is no basis for a
11 punitive damages case. You see the ten statements. There is
12 no basis for an intent to harm with oppression. There is
13 nothing in the record that will support their punitive damages
14 case. We intend to move for a directed verdict as soon as
15 they're done because you will see that.

16 And so that's where we are.

17 **THE COURT:** You want to say that the business model
18 does not allow me to pour through your evidence? I'm happy
19 to --

20 **MS. RAY:** Absolutely. But you do have the ten
21 statements.

22 **THE COURT:** I spend a lot more time on cases, I think,
23 than -- to try to be organized before trial.

24 **MS. RAY:** You appear to.

25 **THE COURT:** So I'm just saying --

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1 **MS. RAY:** You appear to.

2 **THE COURT:** -- I put in a lot of effort.

3 And just, like, because there are only so many hours in
4 the day.

5 **MS. RAY:** No, no.

6 **THE COURT:** I know that your evidence will be slimmed
7 down and only some of it will come in. I can't look at five
8 binders of evidence --

9 **MS. RAY:** We're not asking --

10 **THE COURT:** -- before trial.

11 **MS. RAY:** -- you to prejudge the issue.

12 We're saying you will see; you will see. And this is not
13 a punitive damages case.

14 And, of course, what they would like to do is come in and
15 say, "Hey, they destroyed our entire business, 16, 18,
16 20 million dollars," to inflame the jury, but there is no
17 evidence to support that and you have already made that ruling.

18 We are down to a million dollars. And that is a different
19 case from, not just a damages perspective, but from a story
20 perspective. And that is something that has been very
21 prejudicial to my client, that they have all these lawyers who
22 are trying to prepare this case and it has been a moving
23 target. We literally have had six different numbers in the
24 past week.

25 **THE COURT:** I understand.

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1 **MS. RAY:** And it is the week before trial.

2 **THE COURT:** I understand. Well, it is how it's been
3 since the in limines. It doesn't change the landscape much,
4 except to render more concrete the interplay with Rule 26 and
5 what I've already held as the provable damages case from an --
6 by excluding the expert testimony.

7 All right. So the court will be in recess for about
8 somewhere between -- somewhere around 15 minutes to give our
9 court reporter a break. And when we file the order, we'll
10 bring you out filed copies. You can read it and digest it, and
11 we'll probably resume in about 15 minutes.

12 (Recess taken at 2:39 p.m.)

13 (Proceedings resumed at 4:14 p.m.)

14 **THE COURT:** Okay. We're back on the record.
15 Any further thoughts? I can look at my to-do list.
16 Mr. Susman?

17 **MR. SUSMAN:** We're ready for trial, Your Honor.

18 **THE COURT:** Say that again.

19 **MR. SUSMAN:** We are ready for trial.

20 **THE COURT:** Okay.

21 **MR. SUSMAN:** We'll be here tomorrow morning.

22 **THE COURT:** Perfect. Perfect.

23 Let's just touch base on a couple -- just, I want to make
24 sure I've got -- there's a couple of housekeeping matters.

25 **MS. RAY:** Yeah. We have a few pretrial issues if

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1 we --

2 **THE COURT:** Exactly.

3 **MS. RAY:** Yeah.

4 **THE COURT:** So did I. So I just want to pull out my
5 to-do list. Okay. Give me a second.

6 All right. So what pretrial matters would you guys like
7 to talk about? And I'm happy to talk about mine too, which are
8 modest.

9 **MS. RAY:** We have exhibit issues that we need to
10 address. In particular, we do have the exchange of exhibits
11 for Mr. Fallis' testimony, and we have our objections. We've
12 exchanged already the exhibits, and we've exchanged our
13 objections to those.

14 **THE COURT:** Okay.

15 **MS. RAY:** And so we would like to be able to discuss
16 those.

17 We also want to understand the Court's position with
18 regard to objected-to exhibits in opening statements, because
19 the parties have not yet been able to resolve their objections,
20 and we would like to try to do that. We think there are
21 categories that would be very easy to resolve today.

22 **THE COURT:** That's fine. We can talk about it.

23 **MS. RAY:** Okay.

24 **THE COURT:** You can argue your evidence in opening,
25 but if it's not admitted, I don't -- nobody wants objections in

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1 opening. So you have --

2 **MS. RAY:** Agreed.

3 **THE COURT:** -- every incentive to resolve your
4 evidentiary issues; but if they're unresolved and you catch an
5 objection, that's no good for anybody.

6 I hate it. The jury hates it. You hate it. Again, I
7 am --

8 **MR. KIEVE:** We have none.

9 **THE COURT:** Yeah.

10 **MR. KIEVE:** We have none.

11 **THE COURT:** Okay.

12 **MR. KIEVE:** We're not going to use anything in our
13 opening to which they have an objection.

14 **THE COURT:** Then that takes care of that.

15 **MS. RAY:** It does.

16 **MS. XI:** They haven't given us theirs.

17 **MR. SUSMAN:** We don't know what they're going to do.

18 **THE COURT:** Okay.

19 **MS. RAY:** Well, we --

20 **MS. XI:** We asked three times.

21 (Simultaneous speaking; court reporter interrupts.)

22 **MR. SUSMAN:** Go ahead. You handle it.

23 **MS. XI:** I'm sorry. We've asked them to exchange
24 opening demonstratives, visuals, any other graphical --

25 **THE COURT:** I think it's good to exchange -- to

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1 show -- I always say you're supposed to show your
2 demonstratives before, because that's what you're supposed to
3 do. And I think I said that at the last get-together. I can't
4 remember if my old order says it, but you should show your --

5 **MR. SUSMAN:** It says it.

6 **THE COURT:** Yeah, that's the rule.

7 **MS. RAY:** We don't have a problem with that,
8 Your Honor. We were just waiting to find what the case was so
9 that we could actually write our opening statement.

10 **THE COURT:** That's fine.

11 **MS. RAY:** Right? So now we know what the case is.
12 It's a lot different than it was a week ago. It's a lot
13 different than it was two weeks ago.

14 **THE COURT:** I'm sure.

15 **MS. RAY:** So we absolutely intend to do that.

16 So the question --

17 **MR. KIEVE:** Can we ask when?

18 **MS. RAY:** -- though, is, we still do have -- they've
19 objected to their own financial documents as prejudicial.

20 **THE COURT:** As unauthenticated or as prejudicial?

21 **MS. RAY:** As unduly prejudicial, Your Honor.

22 **MS. XI:** We --

23 **MR. KIEVE:** That's not correct.

24 **MS. RAY:** No, you didn't.

25 (Simultaneous speaking; court reporter interrupts.)

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1 **MS. RAY:** You only looked at them for --

2 **THE COURT:** Just remember our poor --

3 **MS. RAY:** -- the financial statements.

4 **THE COURT:** -- court reporter.

5 And, again, I don't want to overly be so informal as to
6 forget that we have to talk one at a time. That's the rule of
7 engagement in the courtroom.

8 **MS. RAY:** Fair enough.

9 **THE COURT:** Okay. So you first, Ms. Ray.

10 **MS. RAY:** So I would like to turn it over to
11 Ms. Jovais to discuss just a few categories of documents. I
12 think if we can resolve -- I think there's four that we might
13 be able to resolve pretty quickly, and that would help us a lot
14 in determining what we can use in our opening and not.

15 **THE COURT:** Okay. And is this -- because I have my
16 extremely elaborate organizational system, are these -- are
17 your objections to each other's exhibits part of the -- so I
18 have a ridiculous system. So let me just make sure it's all --
19 I'm officially through the pretrial.

20 So is this sponsoring witness objections? No. We're
21 beyond that.

22 **MS. JOVAIS:** So, Your Honor, I think we'd be talking
23 about two things, sort of two issues that relate generally to
24 exhibit objections, and then a couple of categories that relate
25 specifically to --

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1 **THE COURT:** Do you have a document -- I'm sorry for
2 not being specific enough. Do you have a document that you're
3 referencing that you previously filed, or is this something
4 new?

5 **MS. JOVAIS:** No, Your Honor. Before the hearing
6 today, we gave Grouse River our objections to their exhibits.
7 It's just a list of the ones we object to. We can give it to
8 Your Honor, though.

9 **THE COURT:** Okay. That's fine.

10 **MS. RAY:** That's just for Mr. Fallis' testimony.

11 **THE COURT:** Okay. So you've essentially said who
12 you're calling. You've designated the exhibits that he's going
13 to be referencing.

14 And you have objections to some of those exhibits.

15 **MS. RAY:** We do.

16 **THE COURT:** Okay.

17 **MS. JOVAIS:** Correct.

18 **THE COURT:** Fine.

19 **MS. RAY:** And we also have just a general, a first
20 order of business objection to, there have been -- as we've
21 seen Mr. Fallis' exhibits and now they've given us Ryan
22 Murphy's as well, there are new documents that have never been
23 put on the exhibit list on those. And we just need you to
24 reiterate the earlier ruling of the Court, which is that it's
25 too late to add new exhibits to the exhibit list.

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1 That is, I think, incredibly important, that we are now --
2 they're not even trying to add them to the exhibit list any
3 longer; they're just sneaking them into the exhibits that
4 they're using for specific witnesses.

5 **THE COURT:** Okay.

6 **MS. RAY:** They're not on the exhibit list. And there
7 are only -- I think there's three or four. But, you know, this
8 is, I think, highly prejudicial.

9 And we have not added a single exhibit since we did that
10 exhibit list because we understood that we needed to do that at
11 the right time.

12 And I just think the Court should reiterate its earlier
13 order that no new exhibits, which is what you said in the last
14 hearing that we were at.

15 **THE COURT:** Okay. Mr. Susman, what do you want to
16 tell me about that?

17 **MR. SUSMAN:** Yes, Your Honor. The only thing I know
18 we have sent over to them is where an exhibit had a number but
19 an attachment to that exhibit was not -- we found the
20 attachment. You know what the attachment is. I mean, it
21 doesn't change the exhibit. It's just adding the attachment.
22 Because they're produced, you know, they're PDF, and so
23 sometimes --

24 **THE COURT:** Who was the producing party for the
25 exhibit? Like, what's the exhibit?

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1 **MR. SUSMAN:** It's their documents. I think these are
2 all their documents, that when they produced it, you have to
3 get into the native, whatever it is --

4 Am I saying it right?

5 **MS. XI:** Yeah. No. You're right.

6 **MR. SUSMAN:** -- and find the attachment.

7 I can show you. We can deal with them.

8 **MS. JOVAIS:** May I respond --

9 **MR. SUSMAN:** I just think --

10 **MS. JOVAIS:** -- Your Honor?

11 **THE COURT:** What's that?

12 **MS. JOVAIS:** May I respond? I just want to correct a
13 couple of things.

14 First of all, we're not talking about just attachments.
15 We're talking about documents that were used at depositions
16 that have never been put on the parties' exhibit list, which
17 was due over a month ago. We're talking about brand-new
18 documents.

19 **THE COURT:** All right. So point me to the part of my
20 order where I talk about exhibits, because I want to look back
21 at what I said.

22 **MR. KIEVE:** Can I just make an inquiry? Because this
23 may not be an issue.

24 **THE COURT:** I'd first like to figure out what order it
25 was. Let's look at what that is first.

1 **MR. KIEVE:** Can you tell me what documents you're
2 talking about?

3 **THE COURT:** We'll come to that in a second. Let's
4 start with me.

5 **MS. JOVAIS:** Yes. At the pretrial conference,
6 Your Honor, in the transcript at page 30, starting at line 25.

7 **THE COURT:** But where did I put it in an order, a
8 written order?

9 **MS. JOVAIS:** So this was when we were discussing the
10 chart, Your Honor.

11 **THE COURT:** The actionable fraud allegations is
12 different. That's it. Nothing else. Nothing more.

13 **MS. JOVAIS:** No, no. It was the end of --

14 **THE COURT:** End of story.

15 **MS. JOVAIS:** At the end of that conversation,
16 Grouse River sought to put a number of new exhibits into the
17 record, and we strenuously objected to that.

18 And Your Honor said, "There's no new evidence. We're done
19 at this point. It's too late."

20 **THE COURT:** Well, let me look at -- why don't you hand
21 me up the transcript so I can read it?

22 One of the things is -- I mean, here's the thing. And,
23 again, it's fine. I'll look at what I said.

24 There are things that matter and there are things that
25 don't. And there can't be new theories of fraud. There can't

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1 be -- I mean, honestly, at trial, sometimes you haven't seen
2 stuff before but you already know it because it's consistent
3 with what you had. And exhibit lists sometimes do -- they
4 condense, usually, not expand. But I want to know why it
5 matters.

6 **MS. RAY:** Because we've been preparing our witnesses
7 for weeks, because we've been preparing for trial for weeks,
8 and this is of apiece with everything changing at the last
9 minute. And we need certainty; we need constancy. And --

10 **THE COURT:** Well, trials are not buttoned down and
11 they're not perfect.

12 **MS. RAY:** I understand, Your Honor.

13 **THE COURT:** They're just not. And especially if
14 you're the producing party for the exhibit --

15 **MS. RAY:** We're not.

16 **THE COURT:** -- in the first place.

17 **MS. RAY:** We're not.

18 **THE COURT:** So then I need context. I need to see
19 what --

20 **MR. SUSMAN:** We'll give you the exhibit.

21 **THE COURT:** -- the exhibit is.

22 **MS. JOVAIS:** So, for example, Your Honor, Number 115,
23 that's never been on the exhibit list.

24 **MR. KIEVE:** Withdrawn.

25 **MS. JOVAIS:** Great. Okay.

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1 **MR. SUSMAN:** So if we --

2 **MS. JOVAIS:** How about, can we --

3 **MR. SUSMAN:** -- can get the particulars --

4 **MS. JOVAIS:** -- go through some others?

5 **THE COURT:** Let me just get it done.

6 **MR. SUSMAN:** -- we can do it.

7 **THE COURT:** What's that?

8 (Simultaneous speaking; court reporter interrupts.)

9 **MR. SUSMAN:** I'm sorry. If we can go exhibit by
10 exhibit, we can do it efficiently. I mean, some -- you know,
11 what matters, what --

12 **THE COURT:** Sure.

13 **MR. SUSMAN:** And --

14 **THE COURT:** I do expect --

15 **MR. SUSMAN:** -- some of them, we have withdrawn.

16 **THE COURT:** Okay. That's fine.

17 **MR. KIEVE:** And I apologize. I thought it was a trial
18 exhibit and designated it as a TX, and it obviously wasn't. So
19 I'm sorry for that.

20 **THE COURT:** So, for example, I have -- this is another
21 thing because I get things -- let me just look at my own to-do
22 list. I want to pull this out.

23 I don't touch your binders, including my chambers copies.
24 I want you to know that my -- we need to figure out a way,
25 because now I think we repurposed the table that I usually use

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1 for exhibits. You need to figure out where you want to put
2 your witness exhibits. So you guys should look at the
3 courtroom and figure it out. You don't have to worry about it
4 now. You're going to have time in the morning. But you need
5 to figure it out.

6 These exhibits that were given to me, which were chambers
7 copies of exhibits, I have no idea if that's what you're
8 talking about. Since they're dupes, I think some of them must
9 be going into the witness binders and some might be going into
10 my binders. I'm going to put them here.

11 You guys are the masters of the binders. I don't touch
12 them, because I'm just going to mess it up. And so whatever
13 these extra exhibits are, I'm putting them up here.

14 Extra copy of witness exhibits are there; so you have time
15 to sort it out.

16 Okay. So 115 is withdrawn. Okay.

17 **MS. JOVAIS:** Your Honor, can we go back to talking
18 about some of the summaries of financial and management
19 documents?

20 **THE COURT:** Yes.

21 **MS. JOVAIS:** Okay. So Oracle's expert, David Perry,
22 has reviewed thousands of pages of Grouse River financial
23 information. We're talking about things like a QuickBooks file
24 that really can't even be presented in court in a meaningful
25 way. And he prepared summaries of that financial information.

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1 And we're seeking to use just five of those as evidence under
2 Rule 1006.

3 **THE COURT:** Well, summaries require you to have the
4 underlying exhibits moved into evidence. It can be done
5 electronically. That's fine. And then the summary charts can
6 come in. But, you know, again, tit for tat. Like, if
7 you're -- like, do you really want your summaries not to go on
8 to the -- even though we need them for the jury, not to go on
9 to the exhibit list because the summaries haven't been named as
10 an exhibit? Maybe they're already on the exhibit list.

11 **MS. JOVAIS:** They are, Your Honor.

12 **THE COURT:** We want to be organized.

13 And for the document landscape of what happened, those
14 things should go in on the exhibit list.

15 Mr. Kieve?

16 **MR. KIEVE:** May I respond, Your Honor?

17 **THE COURT:** So the summary is admissible, yes.

18 **MS. JOVAIS:** Great.

19 **MR. KIEVE:** May I respond, Your Honor?

20 **THE COURT:** Yes.

21 **MR. KIEVE:** The issue is the following: It is
22 hornbook law that an expert report is hearsay and is
23 inadmissible. Would you agree with me on that?

24 **THE COURT:** The expert report does not go to the jury.

25 **MR. KIEVE:** Okay. So these are simply exhibits to his

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1 expert report.

2 **THE COURT:** Correct. But he can testify based on
3 summaries of voluminous exhibits that are otherwise admitted
4 into evidence under the evidence rules.

5 **MR. KIEVE:** If they're admitted -- no. But exhibits
6 to an expert's report are inadmissible.

7 **THE COURT:** That is incorrect. Experts can rely on
8 hearsay in forming their opinions, but experts can also rely on
9 admissible exhibits.

10 I have no idea whether these are admissible or not, but if
11 they're business records, for example, then they presumably are
12 authen- -- I told you at the beginning, I did not want quarrels
13 with custodial witnesses to lay foundation. When you get
14 exhibits, you should have the custodial declarations. You guys
15 should stipulate to foundation issues. Not relevance, not
16 prejudice, but those sorts of things.

17 And he can rely on actual business records, for example,
18 and then have a summary exhibit that relies on those underlying
19 exhibits that are otherwise admissible. Merely because he
20 relies on them doesn't turn the exhibits into hearsay. They
21 may or may not be hearsay, depending upon what they are.

22 **MR. KIEVE:** Then they have to lay the foundation, as
23 you said.

24 **THE COURT:** Well, I said before, we're not going to
25 waste the jury's time with custodial witnesses. If you're the

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1 producing party -- and, of course, it got complicated here
2 because you couldn't access your financial documents because we
3 had to get Oracle to allow you access to the business
4 documents. So --

5 **MS. RAY:** Everybody has had that access. And most of
6 these are QuickBook files; right? So they are their --

7 **THE COURT:** Heck, you could --

8 **MS. RAY:** -- business records.

9 **MR. KIEVE:** Well, Your Honor --

10 **MS. RAY:** And then --

11 **MR. KIEVE:** -- if I could --

12 **MS. RAY:** Can I finish my sentence?

13 **THE COURT:** Foundation is foundation.

14 **MR. SUSMAN:** I think we can withdraw them. I just
15 need to talk to counsel. Mr. Perry --

16 **THE COURT:** You guys need to do your work, and you
17 should sit and talk through the exhibits. Look, you're trial
18 lawyers. You know how to do this. Go through the exhibits.
19 Talk it through. You're in person. You're not going to be
20 using exhibits in your opening; so you don't need to worry
21 about it. You need to just exchange your demonstratives and
22 any exhibits that you're planning to rely on. You need to sit
23 and work through your evidentiary objections, and it just
24 doesn't work if you don't sit in the room.

25 I'm happy to go through them with you, but I'm not happy

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1 to spend hours working through exhibit -- I'm happy to take a
2 representative exhibit and give you my opinion. There's the
3 opinion about summary. But you guys need to work out your
4 exhibits or waste your trial time objecting to each other, and
5 I'll look at it one exhibit at a time.

6 I'm happy to work through exhibits. I really am. That's
7 why I offered you that Friday at 3 o'clock with the proviso
8 that you spend four hours, because I knew if you got together,
9 you would sort out most things. But it's not my job to
10 baby-sit the admission of evidence, which is easy.

11 Okay. Next.

12 **MS. RAY:** We'd love to hear if they would withdraw
13 their objections to those and then we can do the summary
14 exhibits. That would be great.

15 I think we have another category.

16 **MS. JOVAIS:** All right. So --

17 **MR. KIEVE:** Could you give me the exhibit numbers
18 you're talking about?

19 **MS. JOVAIS:** It's all of the financial documents I
20 listed in my July 3rd letter, Loren. It's all of the payroll
21 reports, the ledgers, the NetSuite reports that are on our
22 exhibit list.

23 **THE COURT:** And I also want to really caution you
24 guys.

25 **MS. JOVAIS:** Oh. And, correct.

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1 **THE COURT:** As I said, again --

2 **MS. JOVAIS:** Advice summaries.

3 **THE COURT:** -- I want you to be careful about
4 overreaching with your expert and opining on causation.

5 I think what I think is fair reporting for expert
6 testimony, which imbues my whole view about the lost
7 profits/revenues area, is you can report forensically what's
8 going on with a business, but I am very skeptical of causation
9 arguments through experts. So you need to be very careful,
10 given the landscape, how it's gone your way, don't overreach or
11 it's a problem.

12 **MS. RAY:** We understand.

13 **THE COURT:** Okay.

14 **MS. RAY:** And there are only five summaries that we
15 intend to use. I think we have identified them for Mr. Kieve,
16 and maybe we can agree on those five summaries.

17 **THE COURT:** And who knows? Maybe Mr. Fallis will be a
18 rebuttal witness.

19 **MS. RAY:** We understand.

20 **THE COURT:** That may be how it goes.

21 **MS. RAY:** We understand.

22 **THE COURT:** Okay.

23 **MS. JOVAIS:** And then, Your Honor, as to a couple of
24 categories of exhibits that they've put on the exhibit list for
25 Mr. Fallis's direct examination, I want to just briefly address

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1 a couple of categories.

2 One is internal NetSuite e-mails. They've put six of
3 those on the exhibit list for Mr. Fallis to discuss. He has no
4 personal knowledge of those.

5 **THE COURT:** So lack of personal knowledge is not -- an
6 e-mail is not necessarily a business record. And lack of
7 personal knowledge is problematic. We've talked before about
8 how -- well, those are different.

9 Yes, Mr. Kieve?

10 **MR. KIEVE:** These are e-mails that are on their
11 exhibit list.

12 **MS. JOVAIS:** So, Your Honor, to clarify --

13 **MR. SUSMAN:** They're in evidence already.

14 **MR. KIEVE:** They're already in evidence.

15 **MS. JOVAIS:** They're not.

16 **MR. KIEVE:** And according to your ruling, you said any
17 unobjected-to evidence is automatically admissible.

18 **THE COURT:** So another point of clarification. If
19 it's an admission, if it's your -- "admission" is a bad word.
20 It can be introduced without a sponsoring witness. And if they
21 decide, in their narrative, they want to talk about it in the
22 context of having it come in, it's a little weird to have a
23 sponsoring witness who doesn't know anything about it,
24 but maybe --

25 **MR. KIEVE:** Exactly.

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1 **THE COURT:** But under the rules, they can use stuff
2 against you whenever they want.

3 **MS. JOVAIS:** And Mr. Fallis can testify about it --

4 **THE COURT:** That's what the evidence rules permit.

5 **MS. JOVAIS:** -- with no personal knowledge?

6 **THE COURT:** That's what the rules permit if they're,
7 essentially, party admissions, yes.

8 **MS. JOVAIS:** Okay. Well, we'll preserve --

9 **THE COURT:** Those are the evidence rules.

10 **MS. JOVAIS:** -- our objections, based on Rule 602, to
11 ensure that Mr. Fallis isn't interpreting what someone at
12 NetSuite said.

13 **THE COURT:** He cannot interpret it. If he doesn't
14 have personal knowledge, he can't talk about the document. But
15 they can put in documents -- they can put in documents --

16 **MS. RAY:** Of course. They can put them in with
17 someone who has personal knowledge of them.

18 **THE COURT:** Incorrect. An opposing party's statement
19 can be offered against the opposing party, and it doesn't have
20 to be sponsored. It's admitted against you. That's the whole
21 point of that rule, Rule 801(d)(2); right? I mean, that's the
22 whole point of a party -- offered against you, yeah.

23 We can argue --

24 **MS. JOVAIS:** But offered against us through someone
25 who has absolutely no personal knowledge of what the e-mail

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1 says and he gets to tell the jury what it means?

2 **THE COURT:** So here's the thing. If there's an FBI
3 agent testifying about a bank robbery and he says he arrested
4 somebody, and he has nothing to do with the confession, the
5 tape, and he wasn't even there, and he maybe has listened to it
6 but he has no personal knowledge other than having reviewed it
7 later, it can be played during that FBI witness's testimony.
8 And the FBI witness doesn't have to talk about it. It can be
9 played.

10 That's the whole point of that rule, a party opponent's
11 statement. I mean, there are those provisos. I put it in one
12 of my orders that I wrote. But that's how it works.

13 **MS. JOVAIS:** So --

14 **THE COURT:** It can be put up -- I mean, we had this
15 conversation because we did not want sandbagging of exhibits
16 that had never been discussed being going in a binder or on the
17 jury laptop, going back to the jury without anyone having
18 talked about it and having the jury spelunk through information
19 that no one talked about it.

20 And I laid out the rule in one of my pretrial orders, but
21 that absolutely is how that rule works.

22 **MS. JOVAIS:** So we'll need to object to Mr. Fallis'
23 testimony if he's testifying to things he doesn't --

24 **THE COURT:** If he elaborates about them.

25 **MS. JOVAIS:** -- have personal knowledge about.

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1 **THE COURT:** But they technically could put up
2 something and say, "I put up what's been previously admitted as
3 Exhibit X," and display it. And if you want to do it, they
4 could have him read it into the record. He can't opine about
5 what it means. That's foundation. But it can go up through
6 him as part of the narrative.

7 **MS. JOVAIS:** Okay. So --

8 **THE COURT:** Those are the evidence rules. Tell me if
9 I'm missing something, but I don't think so.

10 **MS. JOVAIS:** It seems to open the door to Mr. Fallis
11 interpreting NetSuite internal e-mails, but we --

12 **THE COURT:** Then you can object --

13 **MS. JOVAIS:** -- can prove that at trial.

14 **THE COURT:** Then you can object on foundation --

15 **MS. JOVAIS:** We will do that.

16 **THE COURT:** -- to what he said, yeah.

17 **MS. JOVAIS:** Another category we want to talk about is
18 instances -- so we put a number of Grouse River internal
19 e-mails on our exhibit list.

20 **THE COURT:** Yes.

21 **MS. JOVAIS:** And those are party admissions when used
22 by us.

23 They've now indicated that they intend to introduce those
24 with Mr. Fallis. And our reading of your ruling is that those
25 are admissible when they are introduced by Oracle as party

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1 admissions of Grouse River. They are not documents that
2 Mr. Fallis can introduce during his direct testimony.

3 **THE COURT:** So here's the thing. It is not -- an
4 opposing party's statement is not hearsay when offered against
5 the opposing party.

6 That said, there are many, many -- and, again, foundation
7 is important; personal knowledge is important. But often, the
8 classic -- I mean, the classic, it's not offered for the truth;
9 it's offered for the fact that it was said. Operative legal
10 effect.

11 I mean, there are many ways that documents can be offered
12 not for the truth, for context. And people are not foreclosed;
13 they're not divorced. But it doesn't mean it comes in as
14 evidence. It may or may not be hearsay, but there's got to be
15 foundation. So you've got to be careful.

16 But the party opponent's statements are admitted against
17 the party opponent but they cannot be admitted by the person.
18 But it doesn't mean that they -- maybe it's a business record,
19 maybe it's a contemporaneous statement. Who knows? There
20 could be reasons why stuff comes in.

21 So you've got to be careful about how you use that stuff,
22 but it doesn't foreclose its being admitted. It just is an:

23 "Objection; hearsay."

24 "Not for the truth, for the context," blah-blah-blah.

25 I mean, that's kind of how it works. And, again, you've

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1 got to just make sure it matters. They always say that you can
2 lead until it matters on direct. That's foundation.

3 So, anyway. All right. So next category.

4 **MS. JOVAIS:** I think we want to talk about some
5 demonstratives that they've put on their exhibit list.

6 **THE COURT:** Okay.

7 **MS. JOVAIS:** The first is, they want to use a version
8 of Your Honor's "Actionable Alleged Representations" chart
9 without the left-hand column, so without the who, what, when.
10 Those items -- the date, who said it, in what document it was
11 said or at what meeting -- that's part and parcel of their
12 fraud allegations. They can't just put up a list of statements
13 divorced from part of the statement.

14 **THE COURT:** So let's --

15 **MS. JOVAIS:** We will say, we would be fine if
16 Grouse River wanted to use as a demonstrative Your Honor's
17 chart from Docket 291, as long as the statements are renumbered
18 so that they're going sequentially 1 through 10.

19 **THE COURT:** I'm just looking at my earlier order.

20 Is 291 the "final" final?

21 **MS. JOVAIS:** I believe so, Your Honor, yes.

22 **THE COURT:** I have it written here. I'm super
23 organized.

24 **MS. RAY:** Yes, Your Honor.

25 **MR. SUSMAN:** Your Honor, can I show you what it is?

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1 **THE COURT:** I have it right in front of me.

2 **MR. SUSMAN:** Oh, you have it.

3 **THE COURT:** I have my order.

4 Okay. That's your demonstrative.

5 **MR. SUSMAN:** I just want to show you what it is. I
6 mean, it's a demonstrative. We intend to prove -- we intend to
7 prove these ten statements were made and they were false. And
8 that's the fraud. It's exactly the statements. I don't think
9 we have to put on their --

10 **MS. JOVAIS:** It doesn't have the date or the speaker
11 or the leading --

12 **THE COURT:** So the header --

13 **MS. JOVAIS:** -- or the document.

14 **THE COURT:** What we did say is, to the extent that
15 documents -- sorry -- fraud -- the contentions of fraudulent
16 representations are grounded in exhibits, you're stuck with
17 those exhibits and no more. I did not preclude testimony that
18 someone said something to someone about the fraud allegation.

19 **MS. RAY:** Right. But --

20 **THE COURT:** I didn't preclude that.

21 And so at the end of the day, fraud in the inducement, to
22 the extent it's evidence-based, is -- and this is important; so
23 I want to be careful about the exhibits. Really, what I want
24 to be super careful about, from an exhibit standpoint, is the
25 landscape of exhibits as tethered to the fraud conten- -- the

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1 alleged representations. That landscape is fixed. It doesn't
2 mean that people couldn't have said other stuff that supports
3 the fraud allegation. So --

4 **MS. RAY:** That's the whole point, Your Honor.

5 **THE COURT:** And that's the whole point. And that was
6 the point -- I'm pretty sure that that's what I was trying to
7 say in the transcript, because that ship has sailed.

8 With all these exhibits and stuff that happens about --
9 Did the product work? Did it not? -- some of those things, I
10 just think it's unduly constraining to be overly literal about
11 the exhibit list, because exhibit lists evolve.

12 But the fraud allegations -- the fraud representations, as
13 grounded in documents, is static. But I expressly left open
14 some specific fraud al- -- they might be amplified by testimony
15 to give context to it. And some of them I expressly left in
16 there as a possibility.

17 I don't think it matters, at the end of the day, whether
18 the exhibits -- at the very end of the day, the prove-up of it
19 has to -- we have to figure out what that looks like. For
20 example, any chart that goes to the jury in the jury binder
21 should be the chart that's tethered to the exhibits.

22 **MS. RAY:** Exactly. And let's be --

23 **THE COURT:** A hundred percent.

24 **MS. RAY:** -- clear.

25 **THE COURT:** A hundred percent.

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1 MS. RAY: There are ten representations.

2 THE COURT: Yes.

3 MS. RAY: Eight of them are tethered to exhibits.

4 THE COURT: Yes.

5 MS. RAY: There are two --

6 THE COURT: There may be --

7 MS. RAY: No.

8 THE COURT: -- testimony on top of the exhibits,

9 but --

10 MS. RAY: I understand that.

11 THE COURT: -- there can be no more exhibits.

12 MS. RAY: I understand that.

13 THE COURT: And no exhibits --

14 MS. RAY: There are two --

15 THE COURT: -- for the untethered allegations.

16 MS. RAY: Right. But there are two at which they say
17 the statement was made verbally, but they identify the time,
18 the date, the meeting.

19 THE COURT: They're telling you what the testimony is
20 going to be.

21 MS. RAY: No. But it's a fraud -- in order to be a
22 fraud allegation, it requires the who, the what, the when, the
23 where.

24 THE COURT: Right. I appreciate that.

25 MS. RAY: So it's required. Otherwise, it's no longer

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1 a fraud allegation --

2 **THE COURT:** No. I understand.

3 **MS. RAY:** -- if we don't know who said it and we don't
4 know where and when --

5 **THE COURT:** Agreed.

6 **MS. RAY:** -- it was said.

7 **THE COURT:** Agreed. Agreed.

8 **MS. RAY:** Therefore, they cannot take that out of
9 their allegation and then go to the jury and say, "You get to
10 decide whether this was made any time, by any person, at any
11 place."

12 And, again, Your Honor --

13 **THE COURT:** So if they don't prove it up, then that
14 allegation doesn't go to the jury in the final chart, which
15 should go in the final jury binder.

16 **MS. RAY:** But they want to use a divorced statement
17 from the actual time when they allege it was made.

18 **THE COURT:** Is this a demonstrative that you're
19 planning to use in your opening statement to say, "This is what
20 we're going to prove to you in trial"?

21 **MR. SUSMAN:** Yes, Your Honor.

22 **MS. XI:** Yes.

23 **MR. SUSMAN:** And if we fail to prove it --

24 **THE COURT:** Yeah, then you broke your promise.

25 **MR. SUSMAN:** -- because we can't --

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1 **MS. RAY:** Why not use their allegation --

2 **MR. SUSMAN:** -- shame on us.

3 **MS. RAY:** Why not use their actual allegation as
4 the Court has held it is admissible?

5 **THE COURT:** Well, you should use the allegations in
6 the chart. Just make sure --

7 **MR. SUSMAN:** Absolutely.

8 **MS. RAY:** No. They have left out the who, the what,
9 the when, the where. They are not using them. They're only
10 using the statement without the identifying information that
11 they alleged in their complaint.

12 **THE COURT:** I guess I'm having a tough time
13 understanding why it matters outside of the exhibits because
14 they have to prove that up at trial, the who -- and then,
15 presumably -- you're saying you don't -- they haven't
16 identified to you who made those statements.

17 **MS. RAY:** For some of them, no, they haven't. They've
18 only said -- and that's -- we think that's a problem with the
19 fraud allegation. But regardless --

20 **THE COURT:** Okay. We never really had that --

21 **MS. RAY:** -- at a minimum --

22 **THE COURT:** -- conversation before.

23 **MS. RAY:** At a minimum, we have the date at which --
24 on which it was made and the meeting identified at which it was
25 made.

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1 **THE COURT:** So they are stuck with having to do that.
2 And I just don't know why the demonstrative has to have that
3 level of detail.

4 **MS. RAY:** Because what they will try to do in this
5 case, as we've said before, is to ignore the time period that
6 matters and talk about other time periods.

7 **THE COURT:** Well, we --

8 **MS. RAY:** You have said that after March of 2014,
9 nothing that anyone said is a fraud allegation.

10 **THE COURT:** I didn't quite say that. I said it might
11 be evidence that gives context to the allegations previously
12 made being fraudulent.

13 And I've also said that I'm not constraining the evidence
14 to -- but they can't argue it as fraud.

15 **MS. RAY:** That's my point. That's all I'm saying.

16 **THE COURT:** It's the "what happened" landscape,
17 correct.

18 So I just don't understand what the issue is.

19 **MR. SUSMAN:** I don't understand why -- I could get up
20 and orally say to the jury, without mentioning dates and
21 people's names or documents, I could orally say to the jury in
22 my opening statement, "We are going to prove that they made ten
23 misrepresentations to my client before he signed the contract;
24 and those ten are Bullet Point 1, Bullet Point 2."

25 It's a demonstrative of what I'm saying we're going to

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1 prove.

2 **THE COURT:** I think that's fine. It's fine. Your
3 demonstrative, if that's what it is, it's fine. You do have to
4 prove it up, as we discussed it, with the who, what, all of
5 that.

6 **MS. RAY:** Okay.

7 **THE COURT:** All of that.

8 **MS. RAY:** We would still like to have your chart go to
9 the jury for the whole trial.

10 **THE COURT:** I think --

11 **MS. RAY:** It's set now. We know which ones they are.
12 They are their allegations.

13 **THE COURT:** Did you guys ever agree on a jury
14 notebook?

15 **MS. RAY:** Yes. We have agreement on some of the other
16 stuff that will go in the jury notebook. This is the sticking
17 point.

18 **THE COURT:** So is there any --

19 **MS. RAY:** They no longer want that chart.

20 **THE COURT:** -- issue to having the chart go into the
21 jury book?

22 **MR. SUSMAN:** No. The reason why we -- we probably
23 will take something out of the chart. I mean, we don't have to
24 prove it all up.

25 **THE COURT:** That's the problem. That's the problem.

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1 At the end of the day, when it goes to the jury, what
2 constitutes the allegations, the representations of fraud, at
3 the end, do you agree that that can go into the jury book at
4 the end?

5 **MR. SUSMAN:** I agree that some chart can go in at the
6 end.

7 **MS. RAY:** Why can't we just strike them out if they
8 get to the end and --

9 **THE COURT:** Because that's argument.

10 **MS. RAY:** We don't need to think about these.

11 **THE COURT:** And you can absolutely do that in your
12 closing. What a wonderful closing that will be.

13 You commit to all these promises. They don't deliver.
14 It's a trial lawyer's dream. They promised you this. They
15 didn't deliver this.

16 **MS. RAY:** It's just going to be very hard for the jury
17 to follow along if they don't have it in front of them.

18 **THE COURT:** Well, that's what demonstratives are for.

19 They've promised you, and you're going to throw every
20 promise that they make -- there are only ten of them -- back in
21 their face if they don't deliver. You're going to argue each
22 and every one of them isn't a representation. It's a product
23 that just wasn't delivered as anticipated.

24 I mean, I don't know what it will look like. But I think
25 the demonstrative is fine.

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1 What's the lawyers argue is not evidence. At the end of
2 the day, they're held to their fraud allegations which we all
3 agreed are the allegations that they're proceeding on.

4 **MR. KIEVE:** Well, we've not quite agreed, but you've
5 decided.

6 **THE COURT:** You kind of agreed. You did agree when we
7 finally had our summary -- at our hearing, you agreed that
8 based on my summary judgment order, you would stick with those
9 representations of fraud.

10 We whittled them down since --

11 **MR. KIEVE:** I was going to say, but then you sliced
12 and diced them, Your Honor.

13 **THE COURT:** I sliced them because the representation
14 was made that they were tethered to evidence, and if there was
15 no evidence to support them, then there's no actionable
16 representation.

17 **MR. KIEVE:** We are 100 percent agreed on that one.

18 **THE COURT:** Good. Concession. Okay. All right.

19 **MS. JOVAIS:** Your Honor, they've also put on their
20 exhibit list as a demonstrative Grouse River website
21 performance. We think --

22 **THE COURT:** Hang on one sec.

23 We are good to go with the jury. So make sure the Jury
24 Office knows that.

25 **THE CLERK:** They do.

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1 **THE COURT:** They do? Okay. Good. Just want to make
2 sure. They're calling in at 5:00.

3 Okay.

4 **MS. JOVAIS:** We think, but we don't know, that they're
5 referring to these website videos that we maintain are not
6 demonstratives. They are the actual evidence of the website
7 that they're trying to use to prove how it actually worked.

8 We understand Your Honor's ruling, but we plan to argue
9 that there's no foundation. Many of the videos were actually
10 made after Grouse River shut down and had no e-commerce
11 department. So at the very least, we need to know which videos
12 they plan to introduce so that we can prepare those foundation
13 arguments.

14 **THE COURT:** You should tell them what videos you're
15 planning to use. I thought you'd already settled on the ones
16 you were using. You need to tell them.

17 **MR. KIEVE:** We can do that.

18 **THE COURT:** I mean, you need to tell them --

19 **MS. XI:** We'll tell them today.

20 **THE COURT:** -- today.

21 So you need to tell them today.

22 **MR. KIEVE:** And by the way --

23 **THE COURT:** You'll object on foundation, but
24 foundation can be laid.

25 **MR. KIEVE:** Would they --

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1 **THE COURT:** You have to say: Were you familiar with
2 it then? Did it work?

3 Is it helpful to your testimony? It's likely not going to
4 be admitted, and it's likely only a demonstrative.

5 And you'll have -- maybe they'll be able to lay foundation
6 and maybe they won't. We'll listen to the foundation
7 challenges that you advance, but it may be weight, not
8 admissibility. And depending on how handmade it looks, you'll
9 have to decide what utility it does or doesn't offer to the
10 plaintiffs.

11 Okay.

12 **MS. JOVAIS:** And then the other demonstratives on
13 their list, Your Honor, relate to damages. So, obviously, the
14 chart that they submitted to us will need to be substantially
15 revised. I assume they'll agree to that, based on the order
16 you just came out with.

17 **MR. KIEVE:** We're not going to put any charts in that
18 don't have damages that you won't let us get.

19 **MS. JOVAIS:** Just making sure.

20 **THE COURT:** And their damages -- just so you are
21 prepared, I mean, again, you'll -- we'll see how you try your
22 case. But whatever devastation you personally experienced as a
23 result of the event, he gets to talk about it.

24 And then that's what they're going to ask the jury to
25 award harm. So whatever concrete damages they're able to prove

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1 up by evidence and put in, that'll be what it'll be. And it'll
2 be a narrative, and it'll be a question of what worked, what
3 didn't.

4 So a lot of the -- I mean, I get why you want some of the
5 opining that I find way too speculative to be allowable.

6 And your testimony is going to be "These bad things
7 happened."

8 And yours is going to be "Not because of us."

9 That's what this case boils down to. Okay.

10 **MS. JOVAIS:** And the last one, Your Honor, they've put
11 in McEwen Chart 7.5. That's based on the exact same business
12 plan projections that you held are unreliable. That doesn't
13 come in as a demonstrative.

14 **THE COURT:** Well, just, they put it in before, and I
15 just --

16 **MR. KIEVE:** They were not -- you did not allow
17 Mr. McEwen to testify because he was basing upon somebody else.

18 Mr. Fallis can testify as to what the business plan
19 projections were. They can then cross-examine him as to
20 whether they were reliable or not in terms of the overall
21 impact upon this company.

22 **THE COURT:** Well, so the projections -- let's just
23 think about this.

24 **MS. GREENWALD:** Your Honor, if the projections were
25 too speculative for Mr. McEwen to testify to, they're not any

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1 less speculative for Mr. Fallis --

2 **THE COURT:** What I actually said in my order was that,
3 you know, there's nothing there to support -- I mean, it's
4 based on stuff that you can't say what's going on. And I said
5 I'm very skeptical that Mr. Fallis can lay the foundation, talk
6 about projections, but maybe he can.

7 And then I said something -- and so, then, the other issue
8 is the interplay with the Rule 26 disclosures; right? So this
9 is different. This isn't lost revenues, this isn't lost
10 profits, which are out; so we can't talk about that.

11 But your expert's going to talk about how healthy the
12 company was or wasn't, and they're going to cross-examine the
13 expert based on that.

14 And Mr. Fallis gets to testify about his company. So, I
15 mean, so that's just -- he's going to testify about it. And
16 some of that's going to be weight; some of it's going to be
17 foundation; but it likely won't prohibit his testifying a
18 little bit about what I call the snapshot of the company at the
19 moment it all went bad.

20 And then your expert is -- again, that's fair. I mean, I
21 do think that that sort of stuff is fair for expert evaluation,
22 looking at the actual -- and he's the CEO. So we'll just see
23 if he can establish some foundation for it.

24 But you need to be modest, because an overreach buys you a
25 challenge based on foundation. But I think he can give some

1 context.

2 **MS. AGUILAR:** Your Honor, if I may.

3 **THE COURT:** Yes.

4 **MS. AGUILAR:** The chart itself is a lost profits
5 calculation.

6 **THE COURT:** I said no on lost profits.

7 **MS. AGUILAR:** Right. So that's the problem. They're
8 not trying to get the business plan in and the forecast inside
9 the business plan. That's not what the demonstrative is based
10 on. They're trying to get McEwen's lost profits calculation
11 in --

12 **THE COURT:** No.

13 **MS. AGUILAR:** -- again, for the third time.

14 **THE COURT:** No, no.

15 **MR. KIEVE:** It's not a lost profits chart.

16 **THE COURT:** Revenue chart, whatever. I said no.

17 **MS. XI:** Lost revenue.

18 **THE COURT:** Lost revenue chart, exactly.

19 **MS. XI:** Projections are in; right?

20 **THE COURT:** Yes.

21 **MS. XI:** The chart of the projections.

22 **MS. RAY:** No, no. The business plan.

23 **MR. SUSMAN:** Yes, it is.

24 **MS. RAY:** If he wants to put the business plan in and
25 talk about the business plan, we can cross-examine him on the

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1 business plan.

2 **THE COURT:** Yeah.

3 **MS. RAY:** But he's not allowed to use McEwen's
4 now-abandoned-and-inadmissible charts to do that. He
5 doesn't -- that's not contemporaneous. It's not what he knew
6 about as the CEO of the company.

7 **THE COURT:** Agreed.

8 **MS. JOVAIS:** One more particular --

9 **MR. KIEVE:** Excuse me. What did she just say?

10 **THE COURT:** She said if he doesn't have -- basically,
11 she said if he doesn't have knowledge of the -- you can't
12 backdoor the expert's conclusions based on -- into Mr. Fallis'
13 testimony. He can talk about the business plan, but he
14 doesn't -- but the Rule 26 issue takes care of a lot of what he
15 can't talk about. But he can talk about the company's business
16 plan, that the company was doing well or blah-blah-blah. But
17 he can't get into that "And I think that I would have made
18 \$16 million but for this bad product."

19 Query how -- I mean, again, you know your case better than
20 I do. But query how issues would cover -- how much did this --
21 remind me what was the -- how much money -- I know I just
22 looked at this, but how much money was paid out to --

23 **MS. RAY:** To NetSuite?

24 **THE COURT:** -- to NetSuite?

25 **MS. RAY:** They say \$400,000.

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1 **THE COURT:** \$400,000, exactly. Just cover, the word
2 "cover." It's not a breach of contract case.

3 **MS. RAY:** By the way, just to point out that all of
4 the numbers are in Canadian dollars.

5 **THE COURT:** Okay. All right.

6 **MR. KIEVE:** At many times which was worth more than
7 the American dollar.

8 **THE COURT:** Okay. We'll just have to figure out how
9 that works when we get to the verdict.

10 **MS. XI:** We can talk about the numbers that were
11 projected in the business plan; right?

12 **MR. KIEVE:** Oh, I'm sorry.

13 **THE COURT:** You can talk about the business plan, and
14 they can cross-examine you on it.

15 **MS. XI:** Perfect.

16 **THE COURT:** Okay.

17 **MS. JOVAIS:** Okay. One more exhibit that they've put
18 on the list for Mr. Fallis' direct exam is 229, which they call
19 the "Customer E-Mails Sample." This looks to be a Word
20 document that contains anonymous excerpts of what purport to be
21 customer e-mails. That's obviously hearsay. It's something
22 that was never disclosed. We don't know who created it or when
23 or what those e-mails actually are. I mean, that's --

24 **MR. KIEVE:** It was disclosed. They were all
25 disclosed, Your Honor.

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1 **MS. RAY:** I think you should take a look at this,
2 Your Honor. I think it's important to actually see this one.

3 **THE COURT:** Okay. Let me see it. I'm just looking
4 back at --

5 **MR. KIEVE:** I commend them to Your Honor.

6 **THE COURT:** So what exhibits do you want me to look
7 at?

8 **MS. JOVAIS:** 229.

9 **MS. RAY:** It's on your screen.

10 **THE COURT:** Okay.

11 **MS. RAY:** It's a cut-and-paste from we know not where,
12 created -- I mean, there's no authenticating information on
13 this anywhere, and it showed up a few weeks ago.

14 **THE COURT:** All right. How do you propose to
15 authenticate it?

16 **MR. KIEVE:** This is an excerpt.

17 **THE COURT:** Leaving aside the hearsay --

18 **MR. KIEVE:** Excuse me?

19 **THE COURT:** Leaving aside potential hearsay issues,
20 how do you plan to authenticate it?

21 **MR. KIEVE:** This is a business record. It's an
22 excerpt from business records. These are -- these come from
23 the CRM, the Customer Relation Management system that NetSuite
24 installed on my client's system.

25 They are an excerpt, a demonstrative, if you will --

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1 actually, they're not a demonstrative. It's an exhibit. These
2 are actual e-mails that the company received. Mr. Fallis can
3 say that, yes, he received them in the company. They are in
4 the record database. They were prepared at or about the time
5 by someone with knowledge.

6 We've already briefed this, Your Honor.

7 **THE COURT:** Okay. So these are the complaints that
8 your customers had to you about --

9 **MR. KIEVE:** Their ability --

10 **THE COURT:** -- about the product --

11 **MR. KIEVE:** -- to use the website.

12 **THE COURT:** -- whether the product worked after
13 delivery of it?

14 **MR. KIEVE:** Correct.

15 **THE COURT:** And so the authenticating -- so each -- so
16 this is a demonstrative exhibit or it's an "exhibit" exhibit?

17 **MR. KIEVE:** It's an "exhibit" exhibit. It's an
18 excerpt of a business record.

19 **MS. RAY:** It's a cut-and-paste made by an attorney
20 of -- we don't have the underlying -- if you want to put in an
21 e-mail -- first of all, we would object on hearsay grounds to
22 the customer statements therein. But if you want to put on an
23 e-mail to show that an e-mail was sent and received and we
24 could have it and it was produced in this case and we were able
25 to vet it and investigate it through discovery, that's one

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1 thing. This is something else entirely.

2 **THE COURT:** Well, let's just unpack it. This is a
3 summary -- well, the e-mail complaints -- let's just think
4 about this. So people complained about the product.

5 Did you receive -- so the issue is, is it hearsay when
6 customers complain to you about your product, your platform?

7 And the answer is, well, it's not necessarily a matter for
8 the truth. We did get complaints afterwards about how it
9 didn't work. And so -- and those records are -- if they're
10 e-mails, then they could be authenticated using your practice
11 to keep them, address them, respond to them. Presumably, they
12 could come in as a business record or at least for the fact
13 that there were complaints made. It's a little unusual to cut
14 and paste them into one e-mail because it doesn't really
15 give -- it doesn't look real.

16 **MR. KIEVE:** The problem is that these were kept not in
17 an e-mail format, but on the Customer Relation Management
18 database. And so this is the only way --

19 **THE COURT:** But this is like --

20 **MS. RAY:** Which can be --

21 (Simultaneous speaking; court reporter interrupts.)

22 **THE COURT:** Hey, hey, hey. Yes, one at a time.

23 This is a little bit, what you would be proposing is that
24 you have the electronic versions, and the only way to put it in
25 is through a summary exhibit. I mean, but that's what they're

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1 arguing. I don't know.

2 Who's the sponsoring witness? Mr. Fallis? Does he really
3 have knowledge of it?

4 **MR. KIEVE:** Yes. He read these when they came in.

5 **MS. AGUILAR:** Your Honor, if we may, this is not a
6 1006 summary because we don't have the underlying business
7 records.

8 **THE COURT:** Yes, you do, because they got them from
9 your --

10 **MS. AGUILAR:** There's no record. We object to the
11 fact -- they keep saying there's a record that you could pull
12 that would have all these complaints. And we strenuously
13 object to that. We looked everywhere.

14 **THE COURT:** Absent the foundational CRM entries that
15 match up to this, I don't think the summary goes in. But if
16 you have personal -- if you looked at it real time --

17 **MR. KIEVE:** We can bring them all in.

18 **THE COURT:** Well, I mean, you have to be able to give
19 them to them because they need to be able to establish
20 authenticity. This is an authenticity issue.

21 **MR. KIEVE:** We gave them to them.

22 **MS. GREENWALD:** Your Honor, customer complaints are
23 hearsay unless --

24 **THE COURT:** Well, they aren't necessarily.

25 **MS. GREENWALD:** Well, they don't qualify for the

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1 business records exception.

2 **THE COURT:** They can if it's the company's practice to
3 keep them in the ordinary course --

4 **MS. GREENWALD:** And that they --

5 **THE COURT:** -- of business --

6 **MS. GREENWALD:** And they verify --

7 (Simultaneous speaking; court reporter interrupts.)

8 **THE COURT:** Right? If the company --

9 **MR. KIEVE:** Can I make a suggestion?

10 **THE COURT:** One at a time.

11 **MR. KIEVE:** I was just going to suggest, the court
12 reporter gets to hold up her hand and yell at us any time we're
13 going too fast.

14 **THE COURT:** No, but that's not it. It's that we're
15 talking over each other.

16 The issue, the first preliminary issue is just
17 authenticity of them and production of the underlying CRM for
18 them to be able to identify whether they, in fact, exist.

19 Beyond that, there's always a way to get in -- I mean, it
20 depends. Customer complaints and the effect on the business
21 and these things happened along the way, we're not saying it's
22 true but this happened, that is fair context. You don't
23 divorce a case from the documentary context.

24 It's a different issue -- admissibility is a different
25 issue. So it might well be that it doesn't get admitted as a

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1 separate exhibit or maybe it does, but it doesn't get admitted
2 for the truth of the matter.

3 Still, your fundamental objection to authenticity is a
4 good one. And absent that -- you say you got it from them and
5 you produced it back to them.

6 And you're saying you didn't.

7 Absent that documentary -- and Mr. Fallis can still say,
8 "Hey, I got complaints."

9 For example, "How did you get them?"

10 "Well, we maintained them in our whatever database. I
11 reviewed them. I responded to them."

12 "Can you give me some examples of complaints that you
13 received?"

14 "Objection; hearsay."

15 "Overruled. Not for the truth of the matter asserted; for
16 the fact that the complaint was made."

17 "Did you thereafter investigate?"

18 "Yes."

19 "What did your investigation reveal?"

20 "I saw that the system was not functioning in the way just
21 as the customer described."

22 It is all fair testimony. So whether that comes in or
23 not, seems no, based on authenticity reasons probably, but
24 certainly it's fair testimony.

25 **MR. KIEVE:** And it should be admissible at least as a

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1 demonstrative.

2 **THE COURT:** I think that's -- I think that's -- in
3 your closing -- well, no. I don't see it as a demonstrative.
4 I really don't.

5 I mean, you can show, argue anything you want in your
6 closing, you know, bullet pointing testimony, that's evidence.
7 Testimony that went into court is evidence that you can argue
8 in closing, but I don't know that the e-mails go into a
9 demonstrative.

10 **MR. KIEVE:** I will take Beeler on evidence.

11 **THE COURT:** All right. So, okay. You're right.
12 Is that it?

13 **MS. JOVAIS:** Those are the ones we want to address
14 with Your Honor today, yes.

15 **THE COURT:** All right. So let me just make sure I
16 don't have anything else.

17 So you know the extra exhibits are here, however you want
18 to deal with them.

19 You updated me.

20 I'm just going to make sure there's nothing else in here.

21 And I think before -- I'm just making sure there's nothing
22 else.

23 **MS. RAY:** Would you mind telling us how you expect
24 tomorrow to go in terms of timing?

25 **THE COURT:** Yeah. So we kind of went -- I was trying

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1 to look at my notes from the last conference.

2 I believe we said that we hoped to have the questionnaires
3 down here by about -- you know, we'll pick in the other room,
4 but you can work in here. So we'll get the questionnaires to
5 you in the order of call.

6 We will pick the jury. I don't know if you've seen the
7 other courtroom. It's just bigger because there are more
8 jurors being in. They'll come into the courtroom in the order
9 of call. You'll have a list in the order of call. You'll have
10 the questionnaires in the order of call.

11 You can take the time you need to go through the
12 questionnaires. Usually, it doesn't take you more than an
13 hour. Because this is a commercial dispute, it probably -- I
14 don't think -- you don't have the same kinds of for-cause
15 challenges that we do in a police shooting case. So there
16 should be fewer.

17 We're going to get the case in this week.

18 So hopefully by 11:00, we send the jury for a break. We
19 give you -- we'll make sure -- bring snacks and -- because I
20 won't take a lunch break. We'll go as long as -- our court
21 reporter basically can -- I don't know if we only have one
22 court reporter for tomorrow.

23 Elaine?

24 **THE CLERK:** No. We'll have two.

25 **THE COURT:** Two. Okay. Usually, there's a limit to

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1 how far they go because they -- usually it's a firm 15-minute
2 break every hour and a half. They switch off as they choose.
3 There's only so much time that they can handle. That generally
4 drives our second day on Wednesday a little bit more. But I
5 try to go as long as we can tolerate tomorrow.

6 We certainly will pick the jury, open, and begin with
7 Mr. Fallis' testimony and go as long as we can, subject to our
8 court reporter's saying: Enough, we can't go any longer.

9 **MR. SUSMAN:** What is longer?

10 **THE COURT:** We'll take a proper lunch tomorrow, unlike
11 Wednesday.

12 **MS. RAY:** Okay.

13 **THE COURT:** Because -- I mean, because everybody --
14 we'll go as long as we can, but the jury will need a break to
15 get some lunch. The court reporter -- our court reporters will
16 need breaks.

17 So it may be, depending how it goes, we'll pick a jury at
18 11:00; maybe be finished by 12:30; take a 45-minute break; come
19 back at 1:15; open.

20 And Elaine's looking at me.

21 (Discussion off the record between the clerk and the Court.)

22 **THE COURT:** Elaine is saying pretty much what I was
23 saying. We'll probably start jury selection at 11:00. So
24 we'll give them a break. But they'll need another break,
25 because if we send them off at 10:00 for an hour, no one's

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1 going to want to eat lunch at 10:00. So we're going to have to
2 give them a break after we pick the jury.

3 I think you guys told me 30 minutes each for voir dire.
4 You thought that should be plenty. Even if it goes a little
5 over, we'll send them off again for a lunch break. They get an
6 easier lunch break than you do because -- well, actually, we
7 won't be able to do that. We'll do for causes. We'll do our
8 challenges to the jury in this room or in the jury room. It's
9 pretty easy. And then we'll probably take a break before your
10 openings.

11 **MR. KIEVE:** And what time -- assuming -- the openings
12 will start at what time, do you think?

13 **THE COURT:** Well, it just depends on the jury
14 selection. But if we're good and we have a jury by 12:30 or
15 1:00, maybe we open at quarter to 2:00 or 2:00.

16 We've got to do opening charge to the jury, all that kind
17 of stuff.

18 **MR. SUSMAN:** That puts us around --

19 **THE COURT:** And how much have -- you guys said how
20 much for your openings?

21 **MR. SUSMAN:** 45 minutes a side. So that puts us, with
22 the charge, around 4 o'clock.

23 **THE COURT:** And if everyone's too tired, we'll just
24 start with witnesses the next day. If we finish earlier and
25 you can start Mr. Fallis' testimony, it's good to get it in

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1 because tomorrow's Tuesday.

2 **MR. SUSMAN:** We'll be ready to start.

3 **THE COURT:** I know you'll be ready to start. We'll
4 just sort of figure out how everybody feels at that point.

5 **MR. SUSMAN:** But you will not work beyond 5 o'clock?

6 **THE COURT:** I will not.

7 **MR. SUSMAN:** But possibly up to 5:00 tomorrow?

8 **THE COURT:** Possibly. Probably more likely 4:00.

9 **MR. SUSMAN:** And the next day, Your Honor?

10 **THE COURT:** Well, the next day, you'll have
11 Mr. Fallis. You estimated four hours. You should have -- and
12 you're calling their witness as a hostile witness. So I guess
13 he should be here.

14 **MR. SUSMAN:** Yes.

15 **THE COURT:** And then what does -- and that probably
16 will bleed into Thursday. So we have to kind of try to march
17 things along as we can.

18 **MR. SUSMAN:** I understand.

19 **THE COURT:** And remind me who else is on your witness
20 list.

21 **MS. RAY:** So after Mr. Murphy testifies, we'll have
22 Jeff Swan and Branden Jenkins. I don't think either of them
23 will be particularly long. And then our expert. That's it.

24 **THE COURT:** Okay. And so then we'll just see how
25 Wednesday goes for a charging conference. Thursday is busy.

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1 On the other days -- Wednesday, we'll really try to stop at
2 1:30 or 2:00, depending. Just at a reasonable time to
3 conclude. I'll push it, but not too much. I think we'll
4 probably -- will we have two court reporters on Wednesday and
5 Thursday?

6 So we're good. That's good. Sometimes we don't -- we
7 don't always get that just because of other trials. The week
8 after Fourth of July probably is not a big one for people in
9 the building.

10 So we'll see how it goes along. And then we're going to
11 have to have a charging conference at some point. I bumped my
12 civil law and motions. I don't do dark days. So I've got a
13 civil law and motions calendar. So we may want to consider
14 doing a jury instructions conference on Wednesday. We can
15 always do that with FTR as opposed to court reporter.

16 And then hopefully -- just because Thursday afternoon may
17 be a bit dodgy for -- but if we're on to your case by Wednesday
18 afternoon, we should be able to have a charging conference that
19 afternoon.

20 **MR. GATTEY:** I'm sorry. Will you have law and motion
21 on Thursday in the morning?

22 **THE COURT:** Thursday at 2:30. Thursday afternoon,
23 2:30.

24 **MS. RAY:** 2:30. Okay.

25 **THE COURT:** I mean, they'll wait, but we should

PROCEEDINGS

1 hopefully be finished by 2:00.

2 I've got a pretty modest calendar this Thursday. I moved
3 things around, but there are some things I didn't move.

4 Okay. I think that's a wrap. See you guys tomorrow.

5 (Proceedings adjourned at 5:05 p.m.)

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8 CERTIFICATE OF REPORTER

9 I certify that the foregoing is a correct transcript
10 from the record of proceedings in the above-entitled matter.

11
12 DATE: Sunday, July 14, 2019

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17 Ana M. Dub, CSR No. 7445, RDR, CRR, CCRR, CRG, CCG
18 Official Reporter, U.S. District Court
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